TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. ~~751~~ 406

BENJAMIN A. PLUMLEY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

FILED MAY 28, 1892.

15,048.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 751.

BENJAMIN A. PLUMLEY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 14, 1893.

1 UNITED STATES OF AMERICA, *ss.*:

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the supreme judicial court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme judicial court, before you or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Benjamin A. Plumley, petitioner for *habeas corpus*, and The Commonwealth of Massachusetts, appearing and opposing the said petitioner for *habeas corpus*, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of or authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Benjamin A. Plumley, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the sixth day of June next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the seventeenth day of May, in the year of our Lord one thousand eight hundred and ninety-two.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—

WALBRIDGE A. FIELD,
Chief Justice of the Supreme Judicial Court of Massachusetts,

without expressing any opinion whether a writ of error lies in the present case.

2 COMMONWEALTH OF MASSACHUSETTS, } ss.:
Suffolk, }

And now here the judges of the supreme judicial court of the Commonwealth of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said supreme judicial court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John Noble, clerk of said supreme judicial court within and for the county of Suffolk, have hereto set my hand and the seal of said court this twenty-first day of May, A. D. —.

[SEAL.]

JOHN NOBLE, *Clerk*.

3 COMMONWEALTH OF MASSACHUSETTS, } ss.:
Suffolk, }

To all persons to whom these presents shall come, Greeting:

Know ye that among the records of our supreme judicial court, holden at Boston, within and for our said county of Suffolk, from the first day of January, in the year of our Lord one thousand eight hundred ninety-two, to the first day of January, A. D. 1893, it is thus contained, the following being the entire record in the case:

4 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court, Suffolk County. Common Law.

In Re BENJAMIN A. PLUMLEY on *Habeas Corpus*.

Application for Habeas Corpus.

To the honorable the justices of the supreme judicial Court:

Your petitioner, Benjamin A. Plumley, of Boston in the county of Suffolk, respectfully represents, that he is unlawfully restrained of his liberty by John B. O'Brien, the sheriff and keeper of the common jail of Suffolk county at said Boston.

The pretended cause of restraint is as follows:—

On the ninth day of October A. D. 1891, one Charles Harrington filed in the municipal court of the city of Boston, in the county of Suffolk and State of Massachusetts, an affidavit and complaint in the words and figures following: to wit,—

"To the justices of the municipal court of the city of Boston, holden at said Boston for the transaction of criminal business within the county of Suffolk:

"Charles Harrington of the city of Boston in the county of Suffolk, in behalf of the Commonwealth of Massachusetts, on oath complains that Benjamin A. Plumley of said city of Boston, on the sixth

day of October in the year of our Lord one thousand eight hundred and ninety-one, at the city of Boston aforesaid, and within the judicial district of said court, did sell to William B. Hamman a certain quantity, to wit, ten pounds, of a certain article, product, and compound made partly out of certain fats, oils, and oleaginous substances, and compounds thereof, not produced from unadulterated milk or cream from the same, to wit, a certain article, product, and compound known as oleomargarine, the said article, product, and compound then and there being in imitation of yellow butter produced from pure unadulterated milk, and cream of the same. Against the peace of said Commonwealth and the form of the statute in such case made and provided.

"CHARLES HARRINGTON.

"SUFFOLK, *To wit:*

"Taken and sworn to, this ninth day of October in the year of our Lord one thousand eight hundred and ninety-one.

"Before said court.

"WM. W. DAVIS,
"*Assistant Clerk.*"

And thereupon a warrant was issued from and out of the said municipal court for your petitioner, and delivered to John R. Barry a constable of the said municipal court, to be executed; that your petitioner was arrested by the said officer and brought before the said court for trial upon the charge set forth in said affidavit and complaint; that thereupon the said court, after hearing the evidence adduced against your petitioner concerning the charge against him contained in said affidavit and complaint, adjudged your petitioner guilty of the alleged offence therein charged, and that he should pay a fine of one hundred dollars, and that in case of default in the payment thereof your petitioner should stand committed in the common jail of said county of Suffolk, there to remain until said fine is fully paid and satisfied.

And your petitioner further shows, that having made default in the payment of said fine, a mittimus, or writ of commitment, was issued from and out of said court, a copy of which is hereto annexed, directed to the sheriff and keeper of the common jail of said county of Suffolk, to take and confine your petitioner in the said jail, and your petitioner there safely keep until said fine should be fully paid and satisfied, or your petitioner should be otherwise discharged by due process of law.

That by virtue of said mittimus the said sheriff and keeper of said jail seized the person of your petitioner, and is about to confine him, your petitioner, in said jail, to be there kept and imprisoned according to the command of said mittimus.

Your petitioner further shows, that the affidavit and complaint aforesaid charges your petitioner with the violation of a pretended act of the legislature of the State of Massachusetts entitled "An act to prevent deception in the manufacture and sale of imitation butter," approved March 10, 1891, and particularly of section one of said act.

Your petitioner further shows, that at the time and place charged in the aforesaid affidavit and complaint he offered for sale and actually sold one package containing ten pounds of an article called and known as "oleomargarine," the same being as an article
6 designed to take the place of butter produced from pure unadulterated milk, or cream from the same, and being an article manufactured out of certain oleaginous substances or compounds of the same other than that produced from unadulterated milk, or cream from the same; that is to say, that said oleomargarine was manufactured from pure animal fats or substances; that the process of manufacture was clean and wholesome; said article containing the same element and ingredients as butter produced from pure unadulterated milk, or cream from the same; that said oleomargarine so offered and sold as aforesaid was a wholesome, palatable, and nutritious article of human food, and was in no way deleterious to the public health or welfare.

Your petitioner further shows, that he so offered and sold said oleomargarine as aforesaid, then and there intending the same as an article of food, and that the same was so offered and sold by your petitioner, and was bought by the purchaser thereof, as and for oleomargarine, and not as and for butter produced from pure and unadulterated milk, or cream from the same.

That said oleomargarine was manufactured by and was the property of Friedman & Swift, an Illinois copartnership (for whom your petitioner was at the time he so offered and sold said oleomargarine as aforesaid, and still is, the agent), all the members of which said firm are citizens and residents of the State of Illinois, and that said firm has been for several years last past, and still are, extensively engaged in the business of manufacturing oleomargarine at the city of Chicago in the State of Illinois, and there preparing the same for market, and shipping it from thence into various cities, towns, and places in said State of Illinois and in other States of the United States, and there selling the same for human food products.

Your petitioner further shows, that for several years last past oleomargarine has become a recognized, well-known, and legitimate article of commerce in and between the several States of the Union and elsewhere, extensively manufactured, sold, and used as such as an article of human food in the principal markets of trade in this and other countries, and that all oleomargarine manufactured by the said firm of Friedman & Swift, and by other leading manufacturers of the same, is a wholesome, nutritious, palatable article of human food, and in no way deleterious to the public health or welfare.

And your petitioner further shows, that before and at the time of the manufacture of the said oleomargarine (so offered and sold by your petitioner as aforesaid) by the said firm of Friedman & Swift, and during all the time they have been engaged in the manufacture of oleomargarine as hereinbefore set forth, the said firm was and is authorized and licensed so to do under and by virtue of the provisions of an act of Congress entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, im-

portation, and exportation of oleomargarine," passed August 2, 1886, and by virtue of having paid during all that time all special and other taxes required or imposed under and by virtue of the provisions of said act of Congress of or upon it as such manufacturers of oleomargarine or otherwise, and upon the product of said manufacture.

7 That your petitioner was, before and at the time he so offered and sold said oleomargarine as aforesaid, also authorized and licensed so to do by having paid the special tax required of and imposed upon him as a wholesale dealer in oleomargarine, under and by virtue of the provisions of the aforesaid act of Congress.

That said oleomargarine so offered and sold by your petitioner as aforesaid was by the said firm of Friedman & Swift, the manufacturers thereof, packed, marked, branded, labelled, and stamped as required by the provisions of the aforesaid act of Congress; and that the same, at the time and place it was so offered and sold by your petitioner as aforesaid, was, and continued to be, so packed, marked, branded, labelled, and stamped as aforesaid; and that in the manufacture, preparation for market, shipment, and sale of the said oleomargarine, both the said manufacturer of the same and your petitioner as its agent, and as such wholesale dealer, have complied with all the requirements of law. And your petitioner avers that his restraint and imprisonment aforesaid are unauthorized and illegal because,—

First. No oleomargarine is manufactured in this State, and almost all the oleomargarine sold here comes here from the States of Illinois and Indiana, and the said act of the legislature of the State of Massachusetts is in violation of sec. 8, art. 1, of the Constitution of the United States, which provides that "the Congress shall have power to regulate commerce among the several States."

Second. The said act of the legislature of the State of Massachusetts is in violation of sec. 2, art. 4, of the Constitution of the United States, which provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

Third. The said act of the legislature of the State of Massachusetts is in violation of the 14th amendment of the Constitution of the United States, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Fourth. This said act of the legislature of the State of Massachusetts is in conflict with the 5th amendment of the United States Constitution, which provides that "private property shall not be taken for public use without just compensation."

Fifth. The said act of the legislature of the State of Massachusetts is in conflict with the provisions of the aforesaid act of Congress entitled "An act defining butter, also imposing a tax upon

and regulating the manufacture, sale, and importation, and exportation of oleomargarine," passed August 2, 1886, and with the exclusive right of Congress so to legislate, under the Constitution of the United States.

Sixth. This said act of Congress does not give this State the right to regulate the manufacture, sales, or dealings in this article of commerce in this State.

8 Seventh. Your petitioner sold the said oleomargarine by virtue of a license issued to him by the United States in accordance with the rules and regulations of the said act of Congress.

Eighth. This said act of the legislature of the State of Massachusetts is not a proper exercise of the police power of the State.

Ninth. The said act of the legislature of the State of Massachusetts is repugnant to the provision of the constitution of said State, for the reason that the subject-matter of section one of said act (under which your petitioner was charged and convicted as hereinbefore stated) is not embraced in the title of said act, and is otherwise contrary to the provisions of said constitution.

Tenth. All the oleomargarine made in this country resembles butter that has a more or less pronounced yellow tint, and the said act of the legislature of the State of Massachusetts is in effect prohibitory of the sale in this State of all oleomargarine, and it thereby takes away from the defendant private property without giving the defendant any compensation therefor. And this act is in conflict with the constitution of the State of Massachusetts, art. 1, sec. 10, which provides that the private property of an individual shall not be appropriated to public uses without his receiving a reasonable compensation therefor.

Eleventh. This act of the legislature of the State of Massachusetts has been repealed by a later act of the legislature,—Acts of Massachusetts for 1891, chap. 112, approved June 11, 1891.

Twelfth. That, for the aforesaid reasons, the said act is unconstitutional and void, and the said municipal court of the city of Boston was without jurisdiction in the case aforesaid.

Wherefore your petitioner asks that a writ of *habeas corpus* may be granted, and that he may be discharged from such unlawful restraint and imprisonment.

STATE OF MASSACHUSETTS, }
County of Suffolk, } *ss.*:

Benjamin A. Plumley, being duly sworn, upon oath states, that he is the petitioner in the foregoing petition, and that the matters and things therein stated and set forth are true in substance and in fact.

BENJAMIN A. PLUMLEY.

Subscribed and sworn to before me this ninth day of October, A. D. 1891.

HENRY M. AYARS,
Justice of the Peace.

Filed October 9, 1891.

9 COMMONWEALTH OF MASSACHUSETTS, } *ss.*
Suffolk, }

To the sheriff of the county of Suffolk, his deputies, the constables, and police officers of the city of Boston, in said county, and to the keeper of the gaol in said county, Greeting:

Whereas Benjamin A. Plumley, of said Boston, defendant, now stands convicted before the municipal court of the city of Boston, holden at said Boston, for the transaction of criminal business, within the county of Suffolk, of unlawfully selling a certain article, product and compound known as oleomargarine, the said article, product and compound being in imitation of yellow butter produced from pure unadulterated milk and cream of the same on the sixth day of October current, at Boston aforesaid, and within the judicial district of said court, for which offence the said defendant is by said court sentenced to pay a fine of one hundred dollars, for the use of said city of Boston, and to stand committed until this sentence be performed.

With all of which sentence the said defendant now before said court refuses to comply. We therefore command you the said sheriff, deputies, constables, police officers, and each of you, forthwith to convey the said defendant to the common gaol, in the county aforesaid, and to deliver him to said keeper, and make return of this precept with your doings therein.

And you, the said keeper, are hereby in like manner commanded to receive the said defendant (whom we herewith send) into your custody in said gaol, and him there safely keep until he shall comply with said sentence or be otherwise discharged by due course of law.

Witness William E. Parmenter, Esquire, at said Boston, this ninth day of October in the year of our Lord one thousand eight hundred and ninety-one.

WM. H. LIBBY,
Assistant Clerk.

A true copy.
Attest: J. R. BARRY, *Constable.*

A true copy.
Attest: JOHN B. O'BRIEN,
Keeper of the Jail.

SUFFOLK, *To wit:*

CITY OF BOSTON, *Oct.* 9, 1891.

In obedience to the within warrant, I have conveyed the within-named defendant to the gaol in said county, and delivered him to the keeper thereof, with a copy of this warrant.

J. R. BARRY, *Constable.*

A true copy.
Attest: J. R. BARRY, *Constable.*

A true copy.
Attest: JOHN B. O'BRIEN,
Keeper of the Jail.

10 This petition was filed and entered in said supreme judicial court on the ninth day of October, A. D. eighteen hundred ninety-one, the petitioner appearing by Henry M. Ayars, Esquire, his attorney, and thereupon a writ of *habeas corpus* was ordered to issue; and the said writ was issued on said ninth day of October in the words following, to wit:

11 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss.*:

[SEAL.] To John B. O'Brien, sheriff of our said county and keeper of the common jail in said county, Greeting:

We command you that the body of Benjamin A. Plumley, of Boston, in the county of Suffolk, detained and imprisoned under your custody, as it is said, together with the day and cause of his taking and detaining, by whatsoever name the said Plumley shall be called or charged, you have before our justices of our supreme judicial court, holden at Boston, within and for the county of Suffolk, immediately after the receipt of this writ, to do and receive what our said justices shall then and there consider concerning him in this behalf; and have you there this writ.

Witness Walbridge A. Field, Esq., at Boston, this ninth day of October, in the year of our Lord one thousand eight hundred and ninety-one.

JOHN NOBLE, *Clerk*.

12 Thereupon the following return was made upon said writ, viz:

SUFFOLK, *ss.*:

BOSTON, *October* 9, 1891.

In obedience to the within writ of *habeas corpus* I now have the body of the within-named Benjamin A. Plumley before the Honorable Marcus P. Knowlton, one of the justices of the within-named court, and have annexed hereto a copy of the mittimus upon which said Plumley is held in my custody.

JOHN B. O'BRIEN,
Keeper of the Jail.

13 *Mittimus for Not Paying Fine.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss.*:

To the sheriff of the county of Suffolk, his deputies, the constables, and police officers of the city of Boston, in said county, and to the keeper of the gaol in said county, Greeting:

Whereas Benjamin A. Plumley, of said Boston, defendant, now stands convicted before the municipal court of the city of Boston, holden at said Boston, for the transaction of criminal business, within the county of Suffolk, of unlawfully selling a certain article,

product, and compound known as oleomargarine, the said article, product, and compound being an imitation of yellow butter produced from pure, unadulterated milk and cream of the same, on the sixth day of October current, at Boston aforesaid, and within the judicial district of said court, for which offence the said defendant is by said court sentenced to pay a fine of one hundred dollars for the use of said city of Boston, and to stand committed until this sentence be performed.

Fine, 100.

14

With all of which sentence the said defendant now before said court refuses to comply. We therefore command you, the said sheriff, deputies, constables, police officers, and each of you forthwith to convey the said defendant to the common gaol, in the county aforesaid, and to deliver him to said keeper and make return of this precept with your doings therein.

And you, the said keeper, are hereby in like manner commanded to receive the said defendant (whom we herewith send) into your custody in said gaol, and him there safely keep until he shall comply with said sentence or be otherwise discharged by due course of law.

Witness William E. Parmenter, Esquire, at said Boston, this ninth day of October, in the year of our Lord one thousand eight hundred and ninety-one.

WILLIAM H. LIBBY,
Assistant Clerk.

A true copy.
Attest:

J. R. BARRY, *Constable.*

A true copy.
Attest:

JOHN B. O'BRIEN,
Keeper of the Jail.

15 SUFFOLK, *To wit:*

CITY OF BOSTON, *October* 9, 1891.

In obedience to the within warrant I have conveyed the within-named defendant to the gaol in said county and delivered him to the keeper thereof, with a copy of this warrant.

J. R. BARRY, *Constable.*

A true copy.
Attest:

J. R. BARRY, *Constable.*

16 And upon the return of the said writ by which the body of the said Benjamin A. Plumley was before the said court, the attorney general appearing in behalf of said Commonwealth, a hearing was had and the petitioner recognized in the sum of five hundred dollars, with sureties.

And afterwards, on the eleventh day of November, in said year, the case was reported to the full court by the presiding justice, upon the petition, return, and the following statement of conceded facts and offer of proof, to wit:

17 *Agreed Statement of Facts.*

The proceedings are as alleged in the petition. The article sold by the petitioner was the article the sale of which is forbidden by chapter 58 of the acts of 1891. Oleomargarine has naturally a light-yellowish color, but the article sold by the petitioner was artificially colored in imitation of yellow butter.

The allegations concerning the quality or wholesome character of the article sold are not admitted. The petitioner offers to prove the allegations of the petition in respect to the character and qualities of the article, and the Commonwealth objects to such proofs as immaterial, and the petitioner is to have the benefit of his offer if found material.

It is admitted that the article sold was sent by the manufacturers thereof in the State of Illinois to the petitioner, their agent in Massachusetts, and was sold by him in the original package, and that in respect to the article sold the importers and the petitioners had complied with all the requirements of the act of Congress regulating the sale of oleomargarine, and it was marked and distinguished by all the marks, words, and stamps required of oleomargarine by the laws of this Commonwealth.

Filed Nov'r 11, 1891.

[Endorsed:] No. 2814. *In re* Benjamin A. Plumley on *habeas corpus*. Report, &c. Suffolk county.

18 And on the seventh day of May, A. D. eighteen hundred ninety-two, it was ordered by the supreme judicial court for the Commonwealth, by its rescript, as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, May 7 1892.

In the case of Plumley, pet'r, pending in the supreme judicial court for the county of Suffolk—

Ordered that the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

Prisoner remanded to jail.

C. A.

By the court:

HENRY A. CLAPP, *Clerk.*

May 7, 1892.

19 Thereupon, on the seventeenth day of said May, A. D. eighteen hundred ninety-two, the following order was entered by the court, to wit:

20 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

Supreme Judicial Court.

In Re BENJAMIN A. PLUMLEY on *Habeas Corpus*.

And now, in the above-entitled case, in accordance with the rescript of the supreme judicial court for the Commonwealth received therein, it is ordered that the said Benjamin A. Plumley be remanded to the custody of the keeper of the common jail of said county of Suffolk, to be committed to said jail.

By the court:

JOHN NOBLE, *Clerk*.

May 17, 1892.

21 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said court to be hereto affixed.

Witness Walbridge A. Field, Esquire, chief justice of our said supreme judicial court, at Boston, this twenty-first day of
[SEAL.] May, in the year of our Lord one thousand eight hundred and ninety-two.

JOHN NOBLE, *Clerk*.

22 The following is the application for the writ of error and the assignment of errors:

23 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

Supreme Judicial Court.

In Re BENJAMIN A. PLUMLEY, Petitioner for *Habeas Corpus*.

To the Honorable Walbridge A. Field, chief justice of the supreme judicial court of Massachusetts:

The petitioner in this cause complains that errors of law appear in the record of the above-entitled cause of action and respectfully petitions for a writ of error to the Supreme Court of the United States, and that you will issue a citation to the Commonwealth of Massachusetts upon said writ of error, and herewith files his assignments of errors as follows:

First. The court erred in such judgment because it did not take judicial notice of the fact that oleomargarine is a particular, well-known, definite, and established article of commerce in the marts of the world.

Second. The court erred in such judgment because it did not take judicial notice of the fact that oleomargarine has always resembled

yellow butter, and that from its nature it cannot be manufactured without resembling light-yellow butter.

24 Third. The court erred in such judgment because it did not take judicial notice of the fact that oleomargarine, when made in compliance with the act of Congress approved August 2nd, 1886, and entitled "An act defining butter; also imposing a tax upon and regulating the manufacture, sale, and importation and exportation of oleomargarine," must resemble yellow butter.

Fourth. The court erred in such judgment because it did not take judicial notice of the fact that the act under which the petitioner was committed to jail is an act designed to prohibit the manufacture and all sales in the Commonwealth of Massachusetts of the article of commerce known as oleomargarine.

Fifth. The court erred in such judgment against the petitioner upon the facts stated in the record because it did not take judicial notice of the fact that Congress, by an act entitled "An act defining butter; also imposing a tax upon and regulating the manufacture, sale, and importation and exportation of oleomargarine," approved August 2nd, 1886, has made ample provision to protect the public against fraud.

Sixth. The court erred in such judgment against the petitioner upon the facts stated in the record because it has not
25 noticed the fact that oleomargarine is a valuable, wholesome, palatable, and nutritious article of human food, and is in no way deleterious to the public health or welfare.

Seventh. The court erred in such judgment against the petitioner upon the facts stated in the record because it has not noticed that "in respect of the article sold the importers and the petitioner had complied with all the requirements of the acts of Congress regulating the sale of oleomargarine, and it was marked and distinguished by all the marks, words, and stamps required of oleomargarine by the laws of this Commonwealth," and that there was no fraud.

Eighth. The court erred in such judgment against the petitioner upon the facts stated in the record in construing the act of Congress entitled "An act defining butter; also imposing a tax upon and regulating the manufacture, sale, and importation and exportation of oleomargarine," and approved August second, 1886.

Ninth. The court erred in such judgment against the petitioner upon the facts stated in the record in construing section 8, article 1, of the Constitution of the United States.

26 Tenth. The court erred in such judgment against the petitioner upon the facts stated in the record in construing the fourteenth amendment of the Constitution of the United States.

Eleventh. The court erred in such judgment against the petitioner upon the facts stated in the record in construing the fifth amendment of the Constitution of the United States.

Twelfth. The court erred in such judgment against the petitioner upon the facts stated in the record in construing chapter 58 and chapter 412, Acts of Massachusetts for 1891.

Thirteenth. The court erred in such judgment against the peti-

tioner upon the facts stated in the record in deciding that the court had jurisdiction in the matter.

Wherefore the petitioner prays that said judgment may be reversed.

BENJAMIN A. PLUMLEY,
By his attorneys, ROBERT M. MORSE,
(57 *Equitable Bldg., Boston, Mass.*).
WM. J. CAMPBELL,
(217 *La Salle St., Chicago, Illinois*).
ALBERT H. VEEDER,
(240 *La Salle St., Chicago, Illinois*).
HENRY M. AYARS,
(505 *Sears Bldg., Boston, Mass.*).

Filed and allowed May 17, 1892.
Att: JOHN NOBLE, *Clerk.*

27 The following is the report to the full court by the justice before whom the case was heard:

28 COMMONWEALTH OF MASSACHUSETTS, }
Suffolk County. }

Supreme Judicial Court.

In Re BENJAMIN A. PLUMLEY on *Habeas Corpus.*

Report.

This is a petition for the writ of *habeas corpus* hereto annexed. I report the case to the full court on the petition and the following facts and offer of proof.

OLIVER WENDELL HOLMES, JR., *J. S. J. C.*

28½ *Agreed Statement of Facts.*

The proceedings are as alleged in the petition. The article sold by the petitioner was the article the sale of which is forbidden by chapter 58 of the acts of 1891. Oleomargarine has naturally a light-yellowish color, but the article sold by the petitioner was artificially colored in imitation of yellow butter.

The allegations concerning the quality or wholesome character of the article sold are not admitted. The petitioner offers to prove the allegations of the petition in respect to the character and qualities of the article, and the Commonwealth objects to such proofs as immaterial, and the petitioner is to have the benefit of his offer if found material.

It is admitted that the article sold was sent by the manufacturers thereof in the State of Illinois to the petitioner, their agent in Massachusetts, and was sold by him in the original package, and that, in respect to the article sold, the importers and the petitioners

had complied with all the requirements of the act of Congress regulating the sale of oleomargarine, and it was marked and distinguished by all the marks, words, and stamps required of oleomargarine by the laws of this Commonwealth.

[Endorsed :] No. 2814. *In re* Benjamin A Plumley on *habeas corpus*. Report, &c. Suffolk county.

29 The following are the opinions of the supreme judicial court for the Commonwealth :

30 COMMONWEALTH)
v.
HUNTLEY.)

In Re PLUMLEY, Pet'r.

ALLEN, *J.* :

These cases arise under the St. of 1891, c. 58, entitled "An act to prevent deception in the manufacture and sale of imitation butter."

In the first case the defendants were convicted in the superior court of making a sale of oleomargarine at retail, not in the original unbroken package in which it was brought into this State, and the justice who presided at the trial reported the case to this court.

In the second case the petitioner was convicted in the municipal court of Boston of making a sale of oleomargarine, and was sentenced to pay a fine and to stand committed until the sentence should be performed, and he was imprisoned accordingly, and upon his petition a writ of *habeas corpus* was issued, which was heard by a justice of this court, and, it being desired on both sides to present the question of the constitutionality of the statute in this mode, an agreed statement of facts was filed, by which it appeared
31 that the sale by the petitioner was of oleomargarine in the original package.

In both cases the constitutionality of the statute has now been argued, and in the second case there is the further question whether a writ of *habeas corpus* is a proper remedy for the petitioner, or whether he should be left to his appeal to the superior court and to exceptions or writ of error, according to the regular course of procedure in criminal cases.

At the argument the attorney general, while suggesting that the questions arising in the second case ought regularly to be raised in some other way than upon a writ of *habeas corpus*, nevertheless, for certain special reasons, finally united with the counsel for the petitioner in the request that the questions presented should be considered and determined. With the assent of the court the case was accordingly argued in full upon the merits, and although this mode of raising questions in criminal cases is open to some objections, the power of the court to hear and determine questions involving the constitutionality of a statute is established. Sennott's case, 146 Mass., 489; Herrick
32 *v.* Smith, 1 Gray, 1, 49; *Ex parte* Siebold, 100 U. S., 571; *In re* Coy, 127 U. S., 731; Nielson, pet'r, 131 U. S., 176; People

v. Liscomb, 60 N. Y., 559. See also Feeley's case, 12 Cush., 598; Conlon's case, 148 Mass., 168, 172. If the St. of 1891, c. 58, is not repealed, and if it is constitutional in regard to oleomargarine of domestic manufacture and oleomargarine brought here from other States and not sold in the original packages, some of the justices who concur in the view here taken are of opinion that the constitutionality of the statute, so far as oleomargarine brought here from other States and sold in original packages is concerned, cannot be decided in these cases; but a majority of all the justices think the question may properly be considered. We have accordingly considered the case upon the merits of the question, but wish to say that with reference to the mode of procedure it is not to be deemed a precedent for future cases.

The first question raised on the merits is whether the prohibition against selling articles in imitation of yellow butter contained in the St. of 1891, c. 58, is repealed by St. 1891, c. 112, which, among other things, punishes fraudulent sales of oleomargarine and other similar substances, and, as is contended, impliedly permits such sales if made without fraud.

Repeals by implication are not favored, and both statutes must stand unless it plainly appears that the later was intended to be a complete substitute for the earlier one.

By various statutes passed before the year 1891 provisions were made for marks upon oleomargarine and the packages in which it might be contained, with a view to inform purchasers of the character of the article offered for sale. Pub. Sts., c. 56, sects. 17, 19; St. 1884, c. 310; St. 1886, c. 317. If these various requirements were observed oleomargarine might be sold.

Then came the St. of 1891, c. 58, wholly prohibiting under a penalty the manufacture or sale, or offering or exposing for sale, or having in possession with intent to sell, any article of that description "which shall be in imitation of yellow butter produced from pure, unadulterated milk or cream of the same," with a distinct proviso that "nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter." This act was directed solely to products made in imitation of yellow butter. All oleomargarine not made in imitation of yellow butter stood as before.

Then came St. 1891, c. 112, which is the act relied on as repealing the former. By sect. 1, "whoever sells or offers for sale to any person who asks, sends, or inquires for butter any oleomargarine, butterine, or any substance made in imitation of or semblance of pure butter, not made entirely from the milk of cows, with or without coloring matter, shall be declared guilty of fraud, and punished by fine," &c. That is to say, if any oleomargarine or butterine whatever, whether made in imitation of yellow butter or not, is sold or offered for sale to any person who calls for butter, the act is punishable. By c. 58, a distinction between oleomargarine which is in imitation of yellow butter and that which is not is clearly

indicated, and that statute is directed only towards oleomargarine of the former class. By c. 412, sect. 1, the act of selling or offering for sale oleomargarine of either class to those who call for butter is made punishable. The act of selling or offering for sale oleomargarine made in imitation of yellow butter to one calling for
35 butter would be punishable under c. 58, and it was unnecessary to make the later statute broad enough to include that offence. But c. 412, sect. 1, had a different scope and purpose, and was directed to the distinct fraud of selling or offering to persons calling for butter something else besides butter. Subsequent sections in c. 412 contain new enactments concerning the marks by which oleomargarine and other similar products are to be distinguished, and these may all well stand with the provisions of c. 58.

It is, moreover, to be borne in mind that these two statutes were both passed at the same session of the legislature and took effect on the same day. This is strong evidence that they were intended to stand together.

We are of opinion that c. 58 was not repealed by c. 412.

It is not contended that the St. of 1891, c. 58, is in violation of the constitution of Massachusetts, but it is urged that it is in violation of the Constitution of the United States. It was agreed that the petitioner sold an article the sale of which was forbidden by this statute; that oleomargarine has naturally a light-yellowish color; and that the article sold by the petitioner was artifi-
36 cially colored in imitation of yellow butter. We are to assume that the oleomargarine sold by the petitioner was wholesome, palatable, and nutritious.

In respect to intoxicating liquors it was held in Peirce *v.* New Hampshire, License cases, 5 How., 504, that a law of New Hampshire, the effect of which was to prohibit the sale, without license, of a barrel of gin purchased by the defendant in Massachusetts and by him imported into New Hampshire, was not repugnant to the Constitution or laws of the United States. In this Commonwealth, until the recent case of Leisy *v.* Hardin, 135 U. S., 100, this decision has been considered as still in force—Carleton *v.* Rugg, 149 Mass., 150; Blair *v.* Forehand, 100 Mass., 136, 140; Commonwealth *v.* Holbrook, 10 Allen, 200—and only liquors imported from foreign countries have been considered to be outside of the scope of State legislation, Congress having acted only in respect to such. Sts. 1852, c. 322, sect. 14; 1869, c. 415, sect. 27; Pub. Sts., c. 100, sect. 4; Commonwealth *v.* Kimball, 24 Pick., 359; Fisher *v.* McGirr, 1 Gray, 1, 31, 47; Richards *v.* Woodward, 113 Mass., 285.

Peirce *v.* New Hampshire is, however, overruled by Leisy
37 *v.* Hardin, the majority of the court holding that its authority, in so far as it rests on the view that the law of New Hampshire was valid because Congress had made no regulation on the subject, must be regarded as having been distinctly overthrown by numerous cases. 135 U. S., 118. A minority of the court, consisting of Justices Gray, Harlan, and Brewer, came to another conclusion, and, after an elaborate examination of the various cases, say that this review appears to them to demonstrate that that decision,

while often referred to, has never been overruled or its authority impugned. 135 U. S., 158. The later decision of O'Neil *v.* Vermont, not yet published, does not modify the doctrine declared in Leisy *v.* Hardin.

Accepting without discussion the decision of the majority of the court in Leisy *v.* Hardin as settling the law for whatever it covers, we have to consider whether it extends so far as to cut off the power of the legislature to forbid the manufacture and sale of oleomargarine which is made in imitation of yellow butter when such oleomargarine has been imported from another State. We wish and are bound to conform to that decision and to adopt the
38 change which it has made in the law as heretofore understood in this Commonwealth, to the extent that the decision goes, either in express terms or by necessary implication. If, however, any further step is to be taken in that direction, it is better that it should be done by the tribunal which can declare and settle the law for all the States alike, than for us to make a decision not sanctioned by our own convictions and perhaps not required by the views of constitutional rights and obligations entertained by the tribunal of last resort.

In cases where the constitutional provision that Congress shall have power to regulate commerce with foreign nations and among the several States has not been involved or considered, legislation of the character of St. 1891, c. 58, is supported not only by the custom of this Commonwealth and by previous decisions of this court, but by a great weight of authority elsewhere. The statutes and decisions in relation to the sale of milk to which water has been added and of milk below a certain standard of quality furnish the most obvious examples arising in this Commonwealth, showing that the legislation has rested and been vindicated partly on the ground of
39 promoting the health of the community, but more especially on the ground of protecting the public from fraud. Pub. Sts., c. 57, sect. 5; St. 1886, c. 318, sect. 2; Commonwealth *v.* Waite, 11 Allen, 264; Commonwealth *v.* Farren, 9 Allen, 489; Commonwealth *v.* Evans, 132 Mass., 11; Commonwealth *v.* Holt, 146 Mass., 38; Commonwealth *v.* Schaffner, 146 Mass., 512; Commonwealth *v.* Wetherbee, 153 Mass., 159; State *v.* Campbell, 64 N. H., 402; State *v.* Smyth, 14 R. I., 100; People *v.* West, 106 N. Y., 293. See also the statutes relating to vinegar—St. 1884, c. 307; to adulterated drugs and food—St. 1882, c. 262, sect. 1; and wholly prohibiting the sale of jewelry, feathers, and certain other articles by ped-lers—Pub. Sts., c. 68, sect. 3.

In New Hampshire, Missouri, Minnesota, New York, New Jersey, and Pennsylvania, statutes prohibiting the sale of oleomargarine made in imitation of butter have been upheld by the courts as valid. State *v.* Marshall, 64 N. H., 549; State *v.* Addington, 77 Mo., 110; Butler *v.* Chambers, 36 Minn., 69; People *v.* Arensberg, 105 N. Y., 125; Waterbury *v.* Newton, 50 N. J. L., 534; Powell *v.* Commonwealth, 114 Penn. St., 265. In People *v.* Arensberg the decision rested expressly upon the distinction between oleomargarine

made in imitation or semblance of butter and other oleo-
40 margarine which was not intended to be passed off for butter.

In Powell *v.* Commonwealth the court, by Mr. Justice Sterrett, say: "If an article of food is of such a character that few people will eat it, knowing its real character, if at the same time it is of such a nature that it can be imposed upon the public as an article of *food* which is in common use and against which there is no *preju dice*, and if, in addition to this, there is probable ground for believi ng that the only way to prevent the public from being defrauded into purchasing the counterfeit article for the genuine is to prohibit *altogether* the manufacture and sale of the former, then we think *such* a prohibition may stand as a reasonable police regulation, although the article prohibited is in fact innocuous, and although its production might be found beneficial to the public if in buying it they could distinguish it from the production of which it is the imitation." 114 Penn. St., 295, 296. This case was carried by a writ of error to the Supreme Court of the United States, and the judgment of the State court was affirmed. Powell *v.* Pennsylvania, 127 U. S., 678. See also Patterson *v.* Kentucky, 97 U. S., 501; Mugler *v.* Kansas, 123 U. S., 623, 663.

41 The only question, therefore, respecting which there is occasion to doubt is that arising under the provision giving to Congress power to regulate commerce among the several States. It is always conceded that States may pass laws to prevent the introduction within their limits of certain kinds of articles. No full and final enumeration has been made or attempted of the articles which thus remain subject to the exercise of the police power. In Rahrer's case, 140 U. S., 545, the court quote with approval the language of Mr. Justice Catron in 5 How., 599: "If from its nature it does not belong to commerce, or if its condition, from putrescence or other cause, is such when it is about to enter the State that it no longer belongs to commerce, * * * then the State power may exclude its introduction." And again: "That which does not belong to commerce is within the jurisdiction of the police power of the State." 140 U. S., 557. In Bowman *v.* Chicago, &c., Railway, 125 U. S., 465, the court say: "Doubtless the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances
42 infected with the germs of yellow fever or the virus of smallpox, or cattle or meat or other provisions that are diseasep or decayed, or otherwise from their condition and quality unfit for human use and consumption. Such articles are not merchantable; they are not legitimate subjects of trade and commerce," p. 489. The right to exclude convicts, paupers, idiots, and lunatics and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases, was also fully recognized—p. 492, and cases cited. These doctrines are also stated in Leisy *v.* Hardin, where it is declared that "the power to regulate commerce

among the States is a unit; but if particular subjects within its operation do not require the application of a general or uniform system, the States may legislate in regard to them with a view to local needs and circumstances till Congress otherwise directs:" 135 U. S., 108; and again, "Where the subject-matter requires a uniform system as between the States, the power controlling it is vested exclusively in Congress and cannot be encroached upon by the States; but where, in relation to the subject-matter, different rules may be suitable for different localities, the States may exer-
43 cise powers which, though they may be said to partake of the nature of the power granted to the General Government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of Congress in effectuation of the general power." 135 U. S., 109, citing Cooley *v.* Port Wardens of Philadelphia, 12 How., 299.

The difficulty of drawing a clear line of distinction between articles which from their nature the legislature of a State may exclude as injurious to health or morals and those which must be deemed to be proper objects of commerce is obvious; nor is it more easy to define with exactness what subjects should be considered so far local that statutes in respect to them may properly be passed by a State, though incidentally affecting commerce among the several States, until Congress provides otherwise. But all we have to deal with at present is the particular question now before us. The legislature, while allowing the sale of oleomargarine in such form as will indicate its real character to the consumer, has determined that its manufacture and sale, when it is made in imitation of yellow butter, is so productive of deception and fraud as to call for a prohibition
44 of such manufacture and sale. This mischief has been found to exist here. It may or it may not exist in equal force elsewhere. The action of the legislature must be presumed to have been taken upon full investigation and upon reasonable grounds. This presumption in favor of substantially similar legislation of another State is thus expressed by the Supreme Court of the United States: "The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale or offering for sale, or having in possession to sell for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles." Powell *v.* Pennsylvania, 127 U. S., 678, 686; see also Patterson *v.* Kentucky, 97 U. S., 501, 504. By the statute, oleomargarine which is not deceptive in its character may be sold under certain regulations.
45 Oleomargarine which is deceptive, and which is designed and is likely to be passed off for something different from what it really is, must not be made or sold within the State. This

prohibition is applicable to residents and non-residents alike. The question is, May a State protect itself against articles so prepared as to deceive the public? No such question as this arose or was discussed in Leisy *v.* Hardin. Accepting the decision in that case as settling the law for intoxicating liquors of genuine quality, which are what they purport to be, and for tobacco and other articles which are included in the same category of genuine products or compounds, there is a wide distinction between them and articles which are manufactured with a purpose to pass them off for something different from what they purport to be. If the statute under consideration had assumed to forbid the sale of all oleomargarine, a far different question would be presented; but the statute is only directed to the suppression of the manufacture and sale in this Commonwealth of oleomargarine which is deceptive. If the sale of imported liquors which are genuine is protected, does that protection extend so far as to include bogus and imitation liquors so prepared as to be passed off for genuine? If the
46 public were largely imposed upon by the sale of cigars which appeared to consist solely of tobacco, but which in reality were principally composed of something else, would a statute forbidding the manufacture and sale of such deceptive cigars be deemed to interfere with the power of Congress under the Constitution? The statute does not forbid the mere transportation, even of deceptive oleomargarine. It may be carried through this State, or may be brought here for purposes of temporary storage or for the consumption of the importer. What is forbidden is the manufacture or sale. The effect of the statute upon commerce among the States is only indirect and incidental. Sherlock *v.* Alling, 93 U. S., 99; Waterbury *v.* Newton, 50 N. J. Law, 534. Can it be doubted that the legislature may provide for the seizure and destruction of lottery tickets, although in some parts of the country, as they were formerly in Massachusetts, lotteries are still sanctioned by law? Might not the State exclude a patented invention for drawing lotteries? See Vanini *v.* Paine, 1 Harr., 65, cited in 97 U. S., 508.

There being a palpable distinction between the present
47 case and Leisy *v.* Hardin, this court is at liberty to decide upon the validity of the statute involved in the present case according to its own opinion.

In the opinion of a majority of the court the enactment of the statute is a valid exercise of the police power which remains in the several States, and it is not in violation of the constitutional provision giving to Congress the power to regulate commerce among the several States. The latter doctrine has also been expressly held in New Jersey. Waterbury *v.* Newton, 50 N. J. Law, 534.

The case of Minnesota *v.* Barber, 136 U. S., 313, holds a statute to be invalid which by its necessary operation practically excluded from the markets of the State all fresh beef, veal, mutton, lamb, or pork, in whatever form, and although entirely sound, healthy, and fit for food, taken from animals slaughtered in other States. Such a discrimination is held to be beyond the power of the legislature

of a State. This decision, in which all the justices concurred, rests upon different grounds from Leisy *v.* Hardin, which is not
48 referred to in the judgment of the court, delivered by Mr. Justice Harlan, one of the dissenting justices in that case. Brimmer *v.* Rebman, 138 U. S., 78, follows Minnesota *v.* Barber. In like manner statutes forbidding the transportation of all Texas cattle, whether diseased or not, have been held unconstitutional on the ground that they made no distinction. Railroad Co. *v.* Husen, 95 U. S., 465; Kimmish *v.* Ball, 129 U. S., 217, 221.

The St. of 1891, *c.* 58, does not fall within the principle of these decisions, it being limited in its operation to oleomargarine, which is in imitation of yellow butter and therefore of a deceptive character.

The result is that in the first case the verdict of guilty is to stand, and in the second case the prisoner must be remanded to jail.

Ordered accordingly.

49

COM.)
v.
HUNTLEY.)

In Re PLUMLEY.

Dissenting Opinion.

KNOWLTON, *J.*:

I cannot agree with the majority of the court in their opinion that the legislature of a State has power under the Constitution of the United States to prohibit commerce in oleomargarine.

The Constitution of the United States is the supreme law of the land. The States by adopting it gave up of their original powers those whose exercise would conflict with the provisions of the Constitution. Section eight of article one provides that Congress shall have the power "to regulate commerce with foreign nations and among the several States." Individual States cannot legislate in such a way as to interfere with the exercise of this power by Congress. The original right of the several States to regulate their internal affairs, and in the exercise of their police power to
50 enact laws for the protection of the public health, the preservation of the public morals, and the protection of the people from noxious trades and from frauds and crimes, not having been conferred on Congress by the Constitution remains in the States, but it is subordinate to the paramount right of Congress to exercise the powers expressly conferred by the Constitution. The States have given up so much of their police power as would involve in its exercise interference with commerce in any article in which commerce is permitted by Congress. If the interests of commerce and the interests of the people in their domestic affairs are involved at the same time in any business, so that legislation in one interest would conflict with legislation in the other interest, the protection of these domestic interests, so far as they are connected

with commerce, is left to Congress, which can legislate as it chooses in its own field.

When the Constitution was framed the people apparently thought that Congress could be trusted to make regulations in regard to commerce which would have proper relation to the interests of the people in their domestic affairs. When the jurisdiction of a State comes in conflict with the national jurisdiction on a common field, one must give way, and the higher authority must be
51 asked to legislate properly, having due regard to the interest which is made subordinate. So, when it was understood that under the laws then existing none of the States could interfere with commerce in intoxicating liquors, and that the interests of the people of many of the States would be promoted by laws which might restrict that commerce, Congress was appealed to, and an act was quickly passed subjecting this kind of commerce to restrictive laws enacted by the States for the protection of the people in this respect. Act of August 8, 1890, 26 U. S. Sts., 313, c. 728; *In re* Rahrer, 140 U. S., 545. Thus we have a harmonious system which secures all the people of the United States from the imposition of restrictions on commerce through the narrow or selfish policy of the people of any State, and at the same time furnishes protection in reference to such matters connected with commerce as are ordinarily the subject of police regulation, by commercial laws adapted by Congress to the requirements of the people in respect to these matters.

These propositions are, in substance, embodied in the recent decisions of the Supreme Court of the United States. In the case
52 of Leisy *v.* Hardin, 135 U. S., 100, in which a statute of the State of Iowa prohibiting the sale of intoxicating liquors was considered in its application to a sale made in the original package by one who imported the liquor from a neighboring State, it was held that in reference to liquors so imported and sold the statute was of no effect, because of its interference with interstate commerce. This decision has since been followed in Lyng *v.* Michigan, 135 U. S., 161; Minnesota *v.* Barber, 136 U. S., 313; Brimmer *v.* Rebman, 138 U. S., 78, and Voight *v.* Wright, 141 U. S., 62; see also *In re* Rahrer, 140 U. S., 545; Crutcher *v.* Kentucky, 141 U. S., 61; Gibbons *v.* Ogden, 9 Wheat., 1; Brown *v.* Maryland, 12 Wheat., 419. Leisy *v.* Hardin expressly overruled Pierce *v.* New Hampshire, 5 How., 504, which for a long time had been supposed to settle the law in regard to the sale of intoxicating liquors brought from one State to another; but the principle on which Pierce *v.* New Hampshire was decided, namely, that until Congress passes an act expressly authorizing commerce in an article the States may prevent the importation of it, had previously been declared erroneous in cases in which it was held that the absence of legislation by Congress in regard to commerce in ordinary articles of trade between the States was equivalent to
53 a declaration that such commerce should be free and unrestricted. State Freight Tax case, 15 Wall., 232; Welton *v.* State of Missouri, 91 U. S., 275; Bowman *v.* Chicago, &c., Railway, 125 U. S.,

465; Robbins *v.* Shelby Taxing District, 120 U. S., 489; Leloup *v.* Port of Mobile, 127 U. S., 640; Asher *v.* Texas, 128 U. S., 129; Stoutenburgh *v.* Hennick, 129 U. S., 141. The decision in Leisy *v.* Hardin was nothing more than the application to a particular subject of general principles which had previously been established by the court. It had long before been held that a State could not restrict the sale in the original packages of liquors imported from foreign countries, and the prohibiting and restrictive statutes of the States had always excepted such liquors from their provisions. Brown *v.* Maryland, 12 Wheat., 419. But the Constitution gives the States no more power to interfere with commerce among the States than with commerce with foreign nations, and when it was settled that Congress was not called upon to make enactments in regard to particular articles in order to protect them, and that silence was equivalent to an express declaration that commerce should be unrestricted in all articles of such a nature as ordinarily to be subjects of
54 purchase and sale, the decision in Leisy *v.* Hardin followed of necessity. The result could have been avoided only by holding that intoxicating liquors were not articles of commerce, and to do that would have been to contradict a fact of common knowledge, as well as to set aside our laws in regard to import duties, and also the previous decisions of the court. Brown *v.* Maryland, *ubi supra*.

It is held that as to matters of merely local concern, calling for special rules adapted to the locality, the States may pass laws affecting commerce in the absence of controlling action by Congress. Cooley *v.* Port Wardens of Philadelphia, 12 How., 299. But where the subject is national in its character, demanding one uniform system, like transportation from State to State and trade between citizens of different States, there can be no local legislation without the express authority of Congress.

I understand that the majority of the court treat these propositions as settled by the Supreme Court of the United States, but hold that oleomargarine is not an article which in its nature would ordinarily be a subject for traffic, and is not entitled to protection under the implied declaration of Congress that commerce in such articles shall not be interfered with by the legislature of a
55 State. Undoubtedly there are articles so dangerous to life or health that they cannot properly be subjects of commercial dealings. Crutcher *v.* Kentucky, 141 U. S., 47, 60; *In re* Rahrer, 140 U. S., 545, 555; Bowman *v.* Chicago, &c., Railway, 125 U. S., 465, 489. To such an article the Constitution of the United States has no application, and in regard to such Congress has no right to legislate.

It is to be taken as a fact under the report that the oleomargarine sold by the petitioner is a valuable article of food—wholesome, palatable, and nutritious. It is also agreed that it was manufactured and sold in accordance with the requirements of the act of Congress of August 2d, 1886, which contains elaborate provisions regulating the manufacture and sale of this product. It must, therefore, have had upon each package of it a printed label showing that it was

oleomargarine, legally manufactured. 24 U. S. Sts., c. 840, sect. 7. It is agreed that it naturally had a light-yellowish color, and that it was artificially colored in imitation of yellow butter by the use of coloring matter which was not deleterious. It is a fact of common knowledge that butter is often artificially colored yellow, be-
56 cause it is generally considered more attractive and desirable when so colored than when very light in color. This is doubtless equally true of oleomargarine.

The only ground on which it can be contended that oleomargarine like that sold by the petitioner is not an article which may be dealt in by merchants under the common law, and may be a subject of commercial regulation under the Constitution, is the fact that by reason of its appearance it may be fraudulently sold for something better than it is. If all articles whose appearance makes it easy to deceive purchasers in regard to their qualities should be excluded from commerce and denied protection under the Constitution, the business of our merchants would be small indeed. I think we are hardly prepared to hold that no cloth whose fabric is so carded and spun and woven and finished as to give it the appearance of being wholly wool, when in fact it is in part cotton, can be a subject of commercial transactions, or that no jewelry which is not gold but is made to resemble gold, and no imitations of precious stones, however desirable they may be considered by those who wish to wear them, shall be deemed articles of merchandise in regard to which Congress may make commercial regulations.

The prevention of frauds is recognized as a ground for the
57 exercise of the police power, but the possibility that persons may be deceived in the qualities of goods which they buy furnishes the least important of all the reasons for protective legislation. Danger to life, or health, or morals is a far more important ground for interference with individual action. It seems to me that the fact that intoxicating liquors are often so used as to promote crime, ruin health, and produce poverty and degradation furnishes a tenfold stronger reason why the court in Leisy *v.* Hardin should have held that they were not articles of commerce within the meaning of the Constitution than the possibility that oleomargarine, which is a good, wholesome food, may be sold for butter furnishes for excluding it from the marts of the world.

The exception to which I have referred should be construed with great strictness, and anything which is valuable for use and which people may wish to buy and sell should not be declared an outlaw in the realms of trade without strong reasons for the declaration.

The question before us is one of fact, whether oleomargarine colored in the usual way is not to be recognized as an article
58 to be bought and sold among merchants. It is a question which has reference, not to the desires or interests of the people of any particular neighborhood, but to the interests of the civilized world. It ought to be decided by us upon the facts agreed as it should be by Congress or by any of the Federal courts. If it is a proper article of commercial traffic our legislature had no jurisdiction to legislate against the importation and sale of it in the

original packages; and if the St. of 1891, c. 58, be deemed a declaration that it is not an article of commerce, the declaration, being one which the legislature had no authority to make, is of no effect. A legislature or a court whose jurisdiction depends on the existence of a certain fact can do nothing towards creating for itself a jurisdiction by declaring that the fact exists when it does not exist. In this respect the question arising under the Constitution of the United States stands differently from those arising under the constitution of our State. In reference to the latter, it being possible to practice frauds in the sale of this commodity and the statute professing to be enacted for the protection of the people in this particular, and it not appearing that this profession is entirely unfounded, the court cannot inquire into the correctness of the
59 decision of the legislature or the wisdom of its action within its field; but in respect to the former the legislative declaration goes for nothing unless the fact exists which gives jurisdiction to make it. The question decided in Powell *v.* Pennsylvania, 127 U. S., 676, cited in the opinion of the majority, had no reference to the article of the constitution now under consideration, nor to a case where the legislature had no jurisdiction to act.

Upon the question in issue we have the opinion of Congress expressed in the act of August 2d, 1886, which makes the manufacture of oleomargarine a source of internal revenue to the United States, and speaks as strongly as language can in favor of the proposition that this product may properly be manufactured and carried from place to place and sold. I understand that in Eaton's case, just decided, which I have not yet seen, the Supreme Court of the United States has recognized the validity of this act and impliedly held that oleomargarine is a legitimate article of commerce.

It seems to me that oleomargarine legally manufactured, which is absolutely unobjectionable except that by reason of its
60 resemblance to butter dishonest persons may sell it for butter, is as much a subject for commercial dealings as anything else which is bought and sold among merchants. No authority has come to my knowledge which tends at all to show that such a commodity is not an article of commerce. It is very proper that stringent laws should be passed to prevent frauds in the sale of it, but in my opinion we cannot say that Congress has no power to make laws which will secure the right to export it or import it or to sell it anywhere in the original package.

I will not discuss the question whether the statute should be held unconstitutional, or merely inoperative and in abeyance so long as commerce in oleomargarine is left by Congress unrestricted. See *In re* Rahrer, 140 U. S., 545; Com'th *v.* Gagne, 153 Mass., 205; Com'th *v.* Calhane, 154 Mass., 115.

I am authorized to say that Mr. Justice Lathrop concurs in this opinion.

61 [Endorsed:] Com. *vs* Huntley. *In re* Plumley, pet'r. Certified copy of the opinion of the supreme judicial court.

COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *May* 19, 1892.

I certify the annexed to be true copies of the opinions of the supreme judicial court in the case of Commonwealth *vs.* Huntley; *In re* Plumley, pet'r, decided on the seventh day of May, 1892.

WILLIAM V. KELLEN,
Reporter of Decisions.

62 The following is the original citation and acknowledgment of service:

63 The United States of America to the Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the sixth day of June next, pursuant to a writ of error filed in the clerk's office of the supreme judicial court of the Commonwealth of Massachusetts for the county of Suffolk, wherein Benjamin S. Plumley, petitioner for *habeas corpus*, is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Walbridge A. Field, chief justice of the supreme court of the Commonwealth of Massachusetts, this seventeenth day of May, in the year of our Lord one thousand eight hundred and ninety-two.

WALBRIDGE A. FIELD,
Chief Justice of the Supreme Judicial Court of Massachusetts.

BOSTON, 17 *May*, 1892.

I accept due service of the foregoing.

A. E. PILLSBURY,
Att'y Gen'l of Mass.

64 COMMONWEALTH OF MASSACHUSETTS, } *ss.*:
Suffolk, }

I, John Noble, clerk of the supreme judicial court within and for said county of Suffolk, hereby certify that the foregoing are true copies of—

I. The writ of error and
II. The return thereon.
III. The record in the case of *In re* Benjamin A. Plumley on *habeas corpus*.
IV. The application for writ of error and
V. The assignment of errors.
VI. The report of the presiding justice to the full court.
VII. The opinions of the full court; all annexed to and transmitted with the record.

VIII. And of all the proceedings in said case, with all things concerning the same, together with

IX. The original citation and

X. The acknowledgment of service thereon.

In witness whereof I have hereto set my hand and affixed the seal of said supreme judicial court this twenty-first day of
[SEAL.] May, in the year of our Lord one thousand eight hundred and ninety-two.

JOHN NOBLE, *Clerk.*

65 Know all men by these presents that we, Benjamin A. Plumley, of Boston, Suffolk county, and Commonwealth of Massachusetts, as principal, and S. Everett Hyde and James C. Melvin, both of Boston, as sureties, are held and firmly bound unto the Commonwealth of Massachusetts in the full and just sum of one thousand dollars, to be paid to the said Commonwealth of Massachusetts; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the seventeenth day of May, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at a hearing before the supreme judicial court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, in a suit depending in said court between Benjamin A. Plumley, petitioner for *habeas corpus*, and the Commonwealth of Massachusetts, appearing and opposing the allowance of the petition for *habeas corpus*, judgment was rendered against the said Benjamin A. Plumley, petitioner for *habeas corpus*, and the said Benjamin A. Plumley having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Commonwealth of Massachusetts, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the sixth day of June next:

Now, the condition of the above obligation is such that if the said Benjamin A. Plumley shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

BENJAMIN A. PLUMLEY. [L. S.]
JAMES C. MELVIN. [L. S.]
S. EVERETT HYDE. [L. S.]

Signed, sealed, and delivered in presence of—
HENRY M. AYARS.

Approved by—
WALBRIDGE A. FIELD.
Chief Justice of the Supreme Judicial Court of Massachusetts.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond; which bond is on file in the office of the clerk of the supreme judicial court of the Comm'lth of Massachusetts within & for the county of Suffolk.

Attest: JOHN NOBLE,
Clerk Supreme Judicial Court, County of Suffolk.

Endorsed on cover: Case No. 15,048. Massachusetts supreme judicial court. Term No., 751. Benjamin A. Plumley, plaintiff in error, *vs.* The Commonwealth of Massachusetts. Filed May 28th, 1892.

Office Supreme Court U. S.
FILED.
MAR 27 1894
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

No. 751.

BENJAMIN A. PLUMLEY,

PLAINTIFF IN ERROR,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR PLAINTIFF IN ERROR.

ROBERT M. MORSE,
ALBERT H. VEEDER,
WM. J. CAMPBELL,
of Counsel.

Supreme Court of the United States.

No. 751.

BENJAMIN A. PLUMLEY, *Plaintiff in Error*,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Benjamin A. Plumley was convicted in the Municipal Court of the city of Boston of selling "a certain quantity, to wit, ten pounds, of a certain article, product and compound made partly out of certain fats, oils and oleaginous substances and compounds thereof, not produced from unadulterated milk or cream from the same, to wit, a certain article, product and compound known as oleomargarine, the said article, product and compound then and there being in imitation of yellow butter produced from pure unadulterated milk and cream of the same," and was sentenced to pay a fine of one hundred dollars, and, in default thereof, to be committed to jail, and in pursuance of such sentence was committed to jail. (Rec., page 7.)

Thereupon he filed a petition in the Supreme Judicial Court of the State for a writ of habeas corpus, and set forth in his petition that the prosecution was made under Mass. Stats., 1891, Chap. 58, the same being entitled "An Act to prevent deception in the manufacture and sale of imitation butter": that the oleomargarine sold by him was a wholesome,

palatable and nutritious article of human food and was in no way deleterious to the public health or welfare; that it was sold as an article of food and as oleomargarine, and was bought by the purchaser as oleomargarine, and not as butter; that it was manufactured by Friedman & Swift, an Illinois copartnership, in Chicago; that it was owned by Friedman & Swift, for whom the petitioner was the agent; that said firm was authorized and licensed to make oleomargarine under the provisions of Act of Congress, passed Aug. 2, 1886 (24 Stats. at Large, p. 209); that the petitioner was authorized and licensed to make the sale under said Act of Congress; that the oleomargarine sold by the petitioner had been packed, marked, branded, labelled and stamped as required by the Act of Congress, and that in the manufacture, preparation for market, shipment and sale of the oleomargarine all the requirements of law had been complied with.

The petition further alleged that oleomargarine has become a recognized, well-known and legitimate article of commerce, that it is extensively manufactured, sold and used as such as an article of human food, and that it is a wholesome, nutritious and palatable article of human food; further, that all oleomargarine resembles butter.

The petition further alleged that the Massachusetts Statute violated Sect. 8, Art. 1, and the 14th Amendment of the Constitution of the United States, with other allegations not necessary here to repeat. (Rec., pages 2–6.)

Upon this petition a writ of habeas corpus issued, and the petitioner was brought before a justice of the Supreme Judicial Court, and afterwards the case was reported to the full court, upon an agreed statement of facts, which recited that the article sold by the petitioner was the article the sale of which is forbidden by Chapter 58 of the Acts of 1891; that oleomargarine has naturally a light yellowish

color, but that the article sold by the petitioner was artificially colored in imitation of yellow butter; that the petitioner is to have the benefit of his allegations as to the quality and wholesome character of the article sold; that the article sold was sent by the manufacturers in Illinois to the petitioner, their agent in Massachusetts, and was sold by him in the original package, and that in respect to the article sold the manufacturers and the petitioner had complied with all the requirements of the Act of Congress regulating the sale of oleomargarine, and that it was marked and distinguished by all the marks, words and stamps required of oleomargine by the laws of Massachusetts. (Rec., page 10.)

The Supreme Judicial Court of Massachusetts subsequently, by a majority opinion, sustained the constitutionality of the State statute (Rec., pages 14–21), and the petitioner was remanded to jail. But a minority of the court (Knowlton and Lathrop, JJ.) dissented from this decision. (Rec., pages 21–25.)

Thereupon the petitioner brought the case on writ of error to this court. (Rec. page 11.)

Statutes Relating to Oleomargarine.

I.

The law under which the plaintiff in error was convicted is Sect. 1, of Chapter 58, of the Statutes of Massachusetts for the year 1891, entitled "An Act to prevent deception in the manufacture and sale of imitation butter." That section is as follows: "No person, by himself or his agents or servants, shall render or manufacture, sell, offer for sale, expose for sale or have in his possession with intent to sell, any article, product or compound made wholly or partly out of any fat, oil or oleaginous substance or compound thereof, not produced from unadulterated milk or cream from the

same, which shall be in imitation of yellow butter produced from pure unadulterated milk or cream of the same: *provided*, that nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter."

Sect. 2 of the above-named statute provides the penalty for violation of the provisions of Sect. 1.

Sect. 3 provides for prosecutions by the inspectors of milk for violations of the provisions of the act and makes other kindred regulations.

Sect. 4 provides that "this act shall not . . . impair or prevent the prosecution and punishment of any violation of laws existing at the time of its passage and committed prior to its taking effect."

II.

As Sect. 4 of Chapter 58 implies, there had been previous legislation in Massachusetts on the subject of oleomargarine.

The first enactment on the subject was in 1881, by Chapter 292 of the Acts of that year. This statute was incorporated without change into the general inspection laws. (See Chapter 56 of the Public Statutes, Sects. 17 to 21 inclusive). Sects. 17, 19 and 20 have since been amended by Stat. of 1884, Chap. 310, Sects. 1 and 2, and by Stat. of 1886, Chap. 317, Sects. 1 and 2, so that the provisions of the Public Statutes are now (and were in 1891) as follows: "Whoever, by himself or his agents, sells, exposes for sale, or has in his possession with intent to sell, any article, substance or compound, made in imitation or semblance of butter or as a substitute for butter, and not made exclusively and wholly of milk or cream, or containing any fats, oils or grease not produced from milk or cream, shall have the words, 'imita-

tion butter,' or if such substitute is the compound known as 'oleomargarine,' then the word, 'oleomargarine,' or, if it is known as 'butterine,' then the word, 'butterine,' stamped, labelled or marked in a straight line in printed letters of plain, uncondensed Gothic type, not less than one half inch in length, so that said words cannot be easily defaced, upon the top, side and bottom of every tub, firkin, box or package containing any of said article, substance or compound. The said stamp, label or mark shall contain no other words. And whoever, by himself or his agents, exposes or offers for sale any of the said article, substance or compound, not in the original package, shall attach to the said article, substance or compound, in a conspicuous place a label bearing the words, 'imitation butter,' 'oleomargarine,' or 'butterine,' as the article may be, in printed letters," etc., as above. "And in cases of retail sales of any of said article, substance or compound, not in the original packages, the seller shall, by himself or his agents, attach to each package so sold, and shall deliver therewith to the purchaser, a label or wrapper bearing in a conspicuous place upon the outside of the package the words, 'imitation butter,'" etc., as above.

Sect. 19 provides that "whoever sells or exposes for sale, or has in his possession with intent to sell," any of the articles, substances or compounds described in the two preceding sections, except as provided therein, "and whoever, with intent to deceive, defaces, erases, cancels or removes any mark," etc., provided for in said sections, or in any manner shall falsely label, etc., any box, etc., marked, etc., as aforesaid, shall suffer a certain penalty.

Sect. 20 is substantially the same as Sect. 3, Chap. 58, Acts of 1891.

The remaining provision of the Public Statutes, namely, Sect. 21, declares that "for the purposes of the four preced-

ing sections, the terms 'butter' and 'cheese' shall mean the products which are usually known by these names and are manufactured exclusively from milk or cream, with salt and rennet, and with or without coloring matter."

The remaining provisions of the Act of 1886, bearing on the matter are as follows: —

Sect. 3. "Whoever, by himself or his agents, sells, exposes for sale, or has in his possession with intent to sell, any article," etc., "made in imitation or semblance of butter or as a substitute for butter, and not made exclusively and wholly of milk or cream, or containing any fats, oils or grease not produced from milk or cream, contained in any box, tub, article or package, marked or labelled with the word, 'dairy' or the word, 'creamery,' shall" pay a certain fine.

Sect. 4 provides that every person conveying imitation butter, oleomargarine or butterine in carriages or otherwise for the purpose of selling it in any city or town must take out a license from the inspectors of milk, or the town clerk, and shall have his name, place of business, and the number of his license legibly placed on each outer side of his vehicle in Gothic letters not less than one inch in length, under penalty for any violation of the provisions of the section.

Sect. 5 provides that "every person before selling or offering for sale any of the said articles in a store, booth, stand or market place in a city or in a town," must register in the books of the inspectors of milk, or, if there are none, in the books of the town clerk.

III.

Another statute of Massachusetts, namely, Chapter 412 of the Statutes of 1891, entitled, "An Act to provide for the protection of dairy products and to establish a dairy bureau," relates to the same subject matter.

Sect. 1 provides a penalty for all who sell or offer for sale any oleomargarine, butterine, or any substance made in imitation or semblance of pure butter, not made entirely from the milk of cows, with or without coloring matter, to any person who asks, sends or inquires for butter.

Sect. 2 provides a penalty for whosoever sells any of the above-named articles without the marks required by "existing laws" and not having, in addition thereto, "upon every opened tub, package or parcel thereof a placard with the word 'oleomargarine' printed thereon in plain, uncondensed gothic letters, not less than one inch long."

Sect. 3 provides penalties for whosoever sells any of the above-named articles from any dwelling, store, office or public mart, without having conspicuously posted thereon the placard or sign, in letters not less than four inches long, "oleomargarine sold here," or "butterine sold here," said placard to be approved by the bureau provided for by the act in question.

Sect. 4 provides penalties for whosoever peddles, sells or delivers from any cart, wagon or other vehicle, upon the public streets or ways, "any of the above-named articles," not having on both sides of the cart, etc., the placard, in uncondensed gothic letters not less than three inches in length, "licensed to sell oleomargarine."

Sect. 5 provides penalties for whosoever "furnishes, or causes to be furnished, in any hotel, restaurant or at any lunch counter, oleomargarine or butterine to any guest or patron of such hotel," etc., "in the place or stead of butter," without notifying said guest or patron of the fact.

The remainder of the act is taken up with provisions for the enforcement of the laws relating to oleomargarine, particularly with the appointment of three members of the Board of Agriculture to constitute a dairy bureau, with the appointment of an extra official to assist them, with empowering

such Board to spend $4,000 annually in carrying on the work, with giving them, as was already the case with the milk inspectors, power to enter any and all places of business, etc., used in the manufacture of dairy products, oleomargarine and similar substances, with authority to seize specimens for analysis.

IV.

Congress has legislated fully on the subject of oleomargarine in the Act of Aug. 2, 1886 (24 Stat. at Large, Chap. 840, page 209; Supplement to the Rev. Stats. of U. S., page 505), entitled "An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine."

Sect. 1 defines butter to be "the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter."

Sect. 2 declares, "For the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: all substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds" of these substances; "all lard extracts and tallow extracts, and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable oil annotto and other coloring matter, intestinal fat and offal fat, made in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter."

Sect. 3 provides for special taxes on manufacturers and wholesale and retail dealers, defining the same.

Sect. 4 fixes the penalty for carrying on either of the above-named kinds of business without paying the tax.

Sect. 5 provides that persons engaged in manufacturing oleomargarine shall file such notices, inventories and bonds, shall keep such books, render such returns, put up such signs and conduct business under such surveillance of officers as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may require.

Sect. 6 provides that "all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by manufacturers . . . and wholesale dealers shall be in original stamped packages. Retail dealers . . . must sell only from original stamped packages, in quantities not exceeding ten pounds, and shall pack the oleomargarine sold by them in suitable wooden or paper packages, which shall be marked and branded as the Commissioner" shall prescribe. Severe penalties are then provided for infraction of the law.

Sect. 7 provides for the affixing by the manufacturer to each package of a label to the effect that the oleomargarine in said package has been made in accordance with the law, and warning all people not to remove the label. Penalties are then provided for all manufacturers who neglect to use this label and for all persons who remove the same.

Sects. 8 and 9 provide for the imposition of a tax by means of coupon stamps on oleomargarine manufactured and sold, or removed for consumption or use.

Sect. 10 provides for a tax by means of coupon stamps on imported oleomargarine.

Sect. 14 provides that the Commissioner of Internal Revenue, with the assistance of certain officers whose appointment is thereby authorized, shall determine what sub-

stances are subject to the tax in contested cases, and also whether they are deleterious to the public health, with an appeal from his decision to a board constituted for the purpose.

Sect. 15 enacts that all oleomargarine subject to tax and found without proper stamps or marks, and all oleomargarine adjudged deleterious to the public health, shall be forfeited to the United States.

Other sections impose severe fines, penalties and forfeitures for violation of the act.

Petitioner's Points.

The petitioner contends:

That Chapter 58 of the Acts of 1891 is in violation of the provision of the Constitution of the United States, (Art. 1, Sect. 8), which gives power to Congress to regulate interstate commerce, as applied to a sale in Massachusetts, by the agent of a citizen of Illinois, of oleomargarine in the original packages. U. States Stat at L. Congress 2 Aug 2 1886.

Meaning of Chapter 58 of Act of 1891.

It is essential at the outset to determine the scope and purpose of Chapter 58 of the Acts of 1891. It is called "An Act to prevent deception in the manufacture and sale of imitation butter," but the Court will not be deterred by its title from examining the act itself to ascertain its real meaning and application, and such examination will show that it is one of the class of laws, originating with the dairy interest, and intended by ingenious phrase, but ill disguising its real intent, to prohibit the sale of all oleomargarine in Massachusetts. It is an act undertaking to regulate the commerce in oleomargarine. In terms it prohibits the sale of all oleomar-

garine which looks like yellow butter, though the article is a wholesome, palatable and nutritious article of food, and though it is made and sold in conformity to the Act of Congress and to the Massachusetts Statutes relating to inspection, marking, etc., and though it is bought and sold as oleomargarine.

It is found as a fact that all oleomargarine is naturally of a light yellowish color, which, it may be said as a matter of common knowledge, is the natural color of most butter; in other words, that all oleomargarine looks like butter. Both oleomargarine and butter are colored so as to be of a deeper yellow and presumably for the same purpose, to render them more palatable and attractive to consumers.

It sufficiently appears from the facts as agreed and offered to be proved in these cases, from the Act of Congress and from judicial knowledge on the subject, that oleomargarine has become an important article of human food and a particular, well-known, definite and established article of commerce in the markets of the world.

The statute of Massachusetts in effect prohibits the sale of this article, unless it is artificially colored pink, blue or some other color which shall remove its natural yellowish color, and which will necessarily destroy its sale and use.

The statute is equally prohibitory on oleomargarine in its natural state of light yellow as on oleomargarine in its artificial state of deeper yellow. In either case oleomargarine looks like butter.

It is as effectual a prohibition as the New Hampshire statute (Laws of 1885, Chap. 68), which prohibits in terms the sale of oleomargarine which shall be of any other color than pink; or as the statute of Missouri (Act of March 24, 1881), which prohibits the manufacture out of any oleaginous substance, other than that produced from unadulterated milk, etc., of any article designed to take the place of butter, and

this latter act was declared to be an absolute prohibition in State *v.* Addington, 12 Mo. App. 214. The Minnesota Act (Chap. 149 of Laws of 1885) is similar to the Missouri Act, and this act was held to be prohibitory of the sale of all oleomargarine in Butler *v.* Chambers, 36 Minn. 69. An almost identical statute of New York (Chap. 202, Acts of 1884) was held void because it was prohibitory in People *v.* Marx, 99 N. Y. 377, and this decision was approved in People *v.* Arensburg, 105 N. Y. 123.

The statute in Pennsylvania is similar to the statute of Missouri and Minnesota, and was held by the Supreme Court of that State to be prohibitory of all oleomargarine. Powell *v.* Commonwealth, 114 Pa. St. 265.

All of the above statutes, together with that of New Jersey (Laws of 1886, Chap. 84, page 107), are properly referred to in the opinion of the majority of the Supreme Court of Massachusetts as being, like the Massachusetts statute in question, acts for the prohibition of sales of oleomargarine which looks like butter. The phraseology differs somewhat, but the intent of the acts is the same.

It is true that it is suggested in the opinion of the Massachusetts Supreme Court, that oleomargarine which did not look like butter could lawfully be sold, but upon the record in this case it cannot be claimed that any such article as an article of commerce has ever been made or sold.

If any doubt as to the real meaning of the Massachusetts statute should arise on the consideration of the first part of Section 1, it must be removed by examining the language of the proviso at the end of the section: —

"*provided*, that nothing in this act shall be construed to prohibit the sale of oleomargarine in a separate and distinct form *and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter.*"

The only reasonable construction of the law is that it intends to prohibit the sale of all oleomargarine which looks like butter, whether or not such resemblance is the result of coloring matter. The addition of coloring matter for the purpose of deepening the natural yellow of the oleomargarine is not therefore material. Without such addition oleomargarine looks like butter, and its sale is therefore prohibited. The phrases "in imitation of butter" and "looks like butter" are used in the statute as synonymous. Neither phrase as there used involves the idea of fraud or deception, or limits the application of the statute to imitations made for a fraudulent purpose.

The Massachusetts statute is not aimed at oleomargarine which is dangerous to public health nor against oleomargarine which is fraudulently sold as butter. There are ample provisions in the statutes to protect the public against these dangers. The only purpose and necessity of the statute were to prevent the sale of pure, honestly and legally made oleomargarine. The entire enormity of the offence committed by such oleomargarine as is prohibited by the statute is that it looks like butter.

The Act of Congress of 1886 is an Act to Regulate the Sale of Oleomargarine.

An examination of this comprehensive statute shows that Congress intended to exercise to the utmost limit its constitutional power in respect to this article.

The act is intended to secure the manufacture and sale of pure and wholesome oleomargarine throughout the country, to require all the processes of manufacture to be subject to the constant surveillance of its officials, and the use of such brands and stamps as should advise the public fully in respect to the article sold, to regulate the sale and to provide

for the forfeiture of all oleomargarine deleterious to the public health. The system of fines, penalties and forfeitures is intended to be adequate to secure a strict enforcement of the law.

This statute was considered by this Court in United States *v.* Eaton, 144 U. S. 677.

THE MASSACHUSETTS STATUTE IS UNCONSTITUTIONAL.

The Massachusetts statute under consideration, in its application to sales in original packages, brought from another state, is in conflict with Sect. 8 of Article I of the Constitution of the United States, which provides that Congress shall have power "to regulate commerce with foreign nations, and among the several States and with the Indian tribes."

Under this head it is necessary to consider

1. Whether oleomargarine which looks like butter is an article of commerce.

2. Whether the Massachusetts statute affects the interstate commerce in such oleomargarine.

Since the decision of this Court in Leisy *v.* Hardin, 135 U. S. 100, it is no longer necessary to consider the further question which might have arisen if Congress had not legislated on the subject, but, as placing beyond all controversy the claim of the petitioners, it may be said,—

3. That Congress has exercised its constitutional power to regulate the sale of all oleomargarine.

1. As to whether oleomargarine which looks like butter is an article of commerce.

It would seem as if this question needed no argument.

It is conceded that oleomargarine which looks like butter is a wholesome, nutritious, palatable article of human food, and in no way deleterious to the public health or welfare.

No definition of articles of commerce can exclude wholesome articles of food.

In Bowman *v.* Chicago, etc., Railway Co., 125 U. S. 465, the Court said, at page 489, —

"the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence and death, such as rags or other substances infected with the germs of yellow fever or the virus of small pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption. Such articles are not merchantable; they are not legitimate subjects of trade and commerce."

That an article of food should not be an article of commerce, it must be dangerous to the public health or unfit for human use or consumption.

Intoxicating liquors are universally recognized as the most prolific source of disease and crime. It was said by Mr. Justice Gray, in delivering the opinion of the minority of the court in Leisy *v.* Hardin, *supra*, at page 159: "Common experience has shown that the general and unrestricted use of intoxicating liquors tends to produce idleness, disorder, disease, pauperism and crime." In Mugler *v.* Kansas, 123 U. S. 623, the Court said (at page 662) that it could not

"shut out of view the fact, within the knowledge of all, that the public health, the public morals and the public safety may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism and crime existing in the country are, in some degree at least, traceable to this evil."

And yet, when the question as to whether intoxicating liquors are articles of commerce was presented to the Court in Leisy *v.* Hardin, *supra*, the Court said, at page 110, —

"That ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of courts, is not denied,"

and it proceeded to hold void the Iowa statute so far as it applied to interstate commerce in such articles.

Surely, if intoxicating liquors are articles of commerce, wholesome human food is an article of commerce, even if it looks like another article of wholesome food. As was said by Mr. Justice Knowlton, speaking for the minority of the Supreme Court of Massachusetts (Rec. of 751, page 24, 156 Mass. at page 250),—

"It seems to me that the fact that intoxicating liquors are often so used as to promote crime, ruin health, and produce poverty and degradation, furnishes a tenfold stronger reason why the Court in Leisy *v.* Hardin should have held that they were not articles of commerce within the meaning of the Constitution, than the possibility that oleomargarine, which is a good, wholesome food, may be sold for butter furnishes for excluding it from the marts of the world."

Assuming that oleomargarine in general must be held, in the light of common knowledge, of Congressional action and of the agreed facts in this case, to fall within all the definitions of articles of commerce, is there any force in the distinction upon which the opinion of the majority of the Massachusetts Supreme Court is based, that oleomargarine which looks like butter may be mistaken for butter and that that fact renders such oleomargarine not an article of commerce?

It has already been argued and the petitioners contend, that there is no oleomargarine which does not look like butter. But conceding, for the purposes of the argument, that some oleomargarine looks like butter and that some does not, and that the Massachusetts statute is directed against the first

class alone, the petitioners still contend that oleomargarine which looks like butter, and oleomargarine which has been artificially colored in imitation of yellow butter, is as much an article of commerce as oleomargarine which does not look like butter. It falls within all the definitions of the words as they are used in common speech or in the decisions of the courts. It has none of the characteri-stics, defects or weaknesses which take from commodities their quality and rights as articles of commerce.

The Massachusetts Supreme Court cites no case sustaining the distinction which it relies upon, and in seeking to sustain itself puts, it is submitted, a forced construction upon the statute, as where, for instance, it says (Rec. of 751, page 20, 156 Mass. 244).

"Accepting the decision in that case (Leisy *v.* Hardin), as settling the law for intoxicating liquors of *genuine quality*, which are what they purport to be, and for tobacco and other articles which are included in the same category of genuine products or compounds, there is a wide distinction between them and articles which are manufactured *with a purpose to pass them off for something different from what they purport to be*. If the statute under consideration had assumed to forbid the sale of all oleomargarine, a far different question would be presented. *But the statute is only directed to the suppression of the manufacture and sale in this Commonwealth of oleomargarine which is deceptive.*"

The fair interpretation of this language is that the statute is intended to reach only oleomargarine which is intentionally made to deceive, but this is not the language of the statute nor its reasonable construction. Nor would legislation be needed for such purposes. The Act of Congress, as well as Chapter 412 of the Massachusetts Acts of 1891, prohibits frauds in the sale of oleomargarine.

But even if the construction of the statute by the Supreme Court of Massachusetts is correct, and even if its provisions are limited to the prevention of the sale of oleomargarine

which has been colored in imitation of butter for the purpose of deceiving, yet it is contended that such oleomargarine, provided it is still a wholesome and nutritious article of human food, is an article of commerce. The improper purpose of its manufacturers cannot divest the article itself of its inherent qualities, and it is these latter which determine whether it is an article of commerce.

To illustrate the position of the Massachusetts Supreme Court: suppose that a new liquor, resembling in appearance the best Burgundy, should be made by some new process out of some cheap substances, that it should have many of the same merits as Burgundy, and should be a pure and nutritious drink, and that it should be manufactured and sold under a distinct name and bought and sold generally under that name, would there be any question that it would be an article of commerce, and would it cease to be an article of commerce because its makers intentionally made it in imitation of real Burgundy, so that there was a possibility, even in spite of strict statute provisions requiring branding and prohibiting fraud, that somebody might be deceived into buying it for the genuine article?

As said by Mr. Justice Knowlton (Rec., 751, page 24, 156 Mass. 250), —

"If all articles whose appearance makes it easy to deceive purchasers in regard to their qualities should be excluded from commerce and denied protection under the Constitution, the business of our merchants would be small indeed. I think we are hardly prepared to hold that no cloth whose fabric is so carded and spun and woven and finished as to give it the appearance of being wholly wool, when in fact it is in part cotton, can be a subject of commercial transactions, or that no jewelry which is not gold but is made to resemble gold, and no imitations of precious stones, however desirable they may be considered by those who wish to wear them, shall be deemed articles of merchandise in regard to which Congress may make commercial regulations."

2. Assuming then that oleomargarine is an article of commerce, and that oleomargarine which looks like butter, and oleomargarine which is artificially colored to imitate butter, are none the less articles of commerce, the next inquiry is whether the Massachusetts statute, which forbids the sale of oleomargarine that looks like butter and which is artificially colored to imitate butter, conflicts with the constitutional provision giving to Congress power to regulate interstate commerce.

The petitioners submit that the statute does violate the constitutional provision.

It is unnecessary to cite the earlier cases on the subject, as they are carefully reviewed and analyzed in the opinion of the Court in Leisy *v.* Hardin, *supra*, and the result is stated in the language of Mr. Chief Justice Fuller (at p. 123),—

"whenever the law of the State amounts essentially to a regulation of commerce with foreign nations or among the States, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity or its disposition before it has ceased to become an article of trade between one State and another, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the general government, and is therefore void."

That the law under consideration undertakes to prohibit the disposition of oleomargarine, received from another State and while it is in the original package, cannot be denied. That is the offence of which Plumley was convicted.

That the manufacture and sale of oleomargarine is a subject on which Congress may constitutionally legislate is not open to question since the decision in U. S. *v.* Eaton, *supra*.

This case falls within the rule as stated by Strong, J., in State Freight Tax, 15 Wall. 232, at page 279, —

"The rule has been asserted with great clearness, that whenever the subjects over which a power to regulate commerce

is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress."

The great number and variety of the State statutes relating to oleomargarine of themselves required that Congress should establish a uniform system for the whole country.

Co. of Mobile *v.* Kimball, 102 U. S. 691.
Walling *v.* Michigan, 116 U. S. 446.

3. It has already been said that since the decision in Leisy *v.* Hardin, *supra*, it is not essential to establish the invalidity of a State statute undertaking to regulate interstate commerce that Congress should have exercised its constitutional power to legislate upon the subject.

But *a fortiori* when Congress has so legislated, there can be no doubt as to declaring void the State legislation which undertakes to control and avoid the act of Congress.

In the opinion delivered by Mr. Justice Gray in behalf of the minority in Leisy *v.* Hardin, the learned Judge reviews the authorities for the purpose principally of showing that "in matters over which the power of Congress is paramount only, and not exclusive, the power of the States is not excluded until Congress has legislated" (page 148). Again he cites with approval (page 149) the language of Mr. Justice Curtis in Cooley *v.* Board of Wardens, 12 How. 299, in reference to pilotage regulations, —

"We are of opinion that this State law was enacted by virtue of a power residing in the State to legislate; that it is not in conflict with any law of Congress; that it does not interfere with any system which Congress has established by making regulations or by intentionally leaving individuals to their own unrestricted action."

While, therefore, it is true that a minority of the court dissented from the judgment in Leisy *v.* Hardin and held

that, in the absence of Congressional action, it was within the police power of the State to prohibit the sale of intoxicating liquors in the original packages, and intimated that it would be impracticable for Congress to regulate the manufacture of goods in one State to be sold in another, yet the opinion nowhere states that if Congress had legislated even upon the subject of intoxicating liquors such legislation would not be paramount to any State laws.

And if this would be so in the case of intoxicating liquors it would certainly be so in the case of a wholesome article of food.

The petitioners rely upon

Railroad Company *v.* Husen, 95 U. S. 465.
Lyng *v.* Michigan, 135 U. S. 161.
Minnesota *v.* Barber, 136 U. S. 313.
Brimmer *v.* Rebman, 138 U. S. 78.
Voight *v.* Wright, 141 U. S. 62.

In Powell *v.* Pennsylvania, 127 U. S. 678, the question as to a violation of the interstate commerce provision of the Constitution did not arise.

Statutes of other States similar to the Massachusetts law have been held invalid in some of the United States Circuit Courts and of the local courts of the States on the ground that they violated the above provision of the Constitution.

In re Gooch, 44 Fed. Rep. 276.
In re McAllister, 51 Fed. Rep. 282.
In re Worthen, 58 Fed. Rep. 467.
Com. *v.* Schollenberger, 12 Pa. Co. Ct. 535.
Waterbury *v.* Egan, 52 N. Y. State Reporter, 419, 423.

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Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 751.

In re BENJAMIN A. PLUMLEY, Petitioner for Habeas Corpus,
Plaintiff in Error,

v.

COMMONWEALTH OF MASSACHUSETTS,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

ALBERT E. PILLSBURY,
For the Commonwealth of Massachusetts,
Defendant in Error.

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BRIEF OF DEFENDANT IN ERROR.

Statement of the Case.

This case arises under a statute of Massachusetts, chapter 58 of the year 1891, entitled, "An Act to prevent deception in the manufacture and sale of imitation butter," the material parts of which are as follows: —

"Section 1. No person, by himself or his agents or servants, shall render or manufacture, sell, offer for sale, expose for sale or have in his possession with intent to sell, any article, product or compound made wholly or partly out of any fat, oil or oleaginous substance or compound thereof, not produced from unadulterated milk or cream from the same, which shall be in imitation of yellow butter produced from pure unadulterated milk or cream of the same: *provided*, that nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter."

Section 2 provides a penalty for the violation of section 1.

Section 3 imposes certain duties upon and gives certain powers to milk inspectors for the enforcement of the statute.

Section 4 saves pending prosecutions under "existing laws."

Section 5 provides that the act shall take effect on the first day of September, 1891.

The plaintiff in error was convicted in the Municipal Court of Boston of making a sale of oleomargarine in the original package as brought into Massachusetts from Illinois, and was sentenced to pay a fine and in default to stand committed. Thereupon a writ of habeas corpus was issued by the Supreme Judicial Court upon his petition, which was heard by a justice of that court, and reported to the full court upon the petition and agreed statement of facts.

It was agreed that the oleomargarine sold was artificially colored in imitation of butter, and that it was within the prohibition of the statute. RECORD, p. 13.

It was claimed by the plaintiff in error that the statute, chapter 58 of 1891, is in conflict with various provisions of the Constitution of Massachusetts and of the United States, as appears in the assignments of error, and also that it was repealed by another act of the same year entitled, "An Act to provide for the protection of dairy products and to establish a State dairy bureau," being chapter 112 of the year 1891; and the question was also raised whether the statute, chapter 58, is in conflict with the commerce clause of the Constitution of the United States. This is the principal question here.

In the full court the constitutionality of the statute was sustained, all other objections were overruled, and it was held that the petitioner must be remanded. The case is reported in 156 Mass. Reports, 236.

The plaintiff in error seeks to reverse this judgment of the Supreme Judicial Court of Massachusetts.

FIRST ASSIGNMENT OF ERROR.

Several of the assignments of error have no sufficient foundation in the record; being based upon an assumption of that which does not appear or which is contrary to the truth.

The first assignment of error is unfounded in fact. The judgment of the Supreme Judicial Court of Massachusetts in this case recognizes and assumes, so far as material, that oleomargarine may be an article of commerce, the court expressly saying "If the statute under consideration had assumed to forbid the sale of *all* oleomargarine, a far different question would be presented; but the statute is only directed to the suppression of the manufacture and sale in this Commonwealth of oleomargarine which is *deceptive*," etc. RECORD, p. 20.

SECOND ASSIGNMENT.

The second assignment also is unfounded. The court did notice and assume the fact that oleomargarine resembles yellow butter. It was a part of the agreed statement of facts below that "oleomargarine has naturally a light yellowish color," and the court refers to this fact as agreed, and obviously proceeds upon it. RECORD, p. 16.

That oleomargarine "from its nature cannot be manufactured without resembling light yellow butter" did not appear and is not admitted; and if true, is not a fact of such common knowledge that courts are bound to take judicial notice of it. It appears from the agreed facts and the opinion, that "the article sold by the petitioners was artificially colored in imitation of yellow butter;" which brings it directly within the prohibition of the statute, and the fact, if it is a fact, that oleomargarine necessarily resembles butter is immaterial. RECORD, pp. 13, 16.

See Commonwealth *v.* Byrnes, 158 Mass. 172, 174.
1 Greenleaf Ev. 4–6.

THIRD ASSIGNMENT.

The court was not called upon to take notice, and could not take notice, of the fact set out in this assignment, that oleomargarine made in compliance with the Act of Congress of Aug. 2, 1886, must resemble yellow butter. The fact did not appear in the case, and is not of common knowledge. It is evident from reading the Act that oleomargarine can be made in compliance with it in different ways and of a great variety of ingredients. It does not prescribe the ingredients or the process of manufacture. And the Act of Congress, or the

character or color or process of manufacture of oleomargarine under it, were not necessarily involved in the case, for the reasons suggested below in the discussion of that Act.

The court was not dealing with natural oleomargarine, but with an article "artificially colored in imitation of yellow butter;" and as noted above, it took notice of the fact that oleomargarine is naturally of a light yellowish color. RECORD, pp. 13, 16.

FOURTH ASSIGNMENT.

This assignment, if not abandoned, raises only a question of the construction of the Massachusetts statute, upon which this court will accept as conclusive the construction put upon it by the highest court of Massachusetts; which is, that the statute is not designed to prohibit and does not prohibit "the manufacture and all sales" of oleomargarine in Massachusetts. RECORD, pp. 15, 16, 19, 20.

> Harrison *v.* Myer, 92 U. S. 111, 116.
> Louisville, etc., Railway Co. *v.* Mississippi, 133 U. S. 587, 591.

But if open to further consideration, this assignment also is unfounded. It is not true that the statute is designed to prohibit the manufacture and all sales in Massachusetts of the article of commerce known as oleomargarine. On the contrary, it is directed generally against artificial imitations of butter. The only mention of oleomargarine is to expressly exclude it from the prohibition, under the prescribed conditions. The statute expressly permits both the manufacture and sale of oleomargarine.

Further: At the time when the case arose there was and still is in force a statute of Massachusetts, being chapter 317 of the Acts of 1886, permitting the sale of oleomargarine under certain restrictions, which has existed in nearly the same form since 1881, the material part of which is as follows:—

"AN ACT IN RELATION TO THE INSPECTION AND SALE OF IMITATION BUTTER.

Be it enacted, etc., as follows:

SECT. 1. Section seventeen of chapter fifty-six of the Public Statutes is hereby amended so as to read as follows: — Whoever, by himself or his

agents, sells, exposes for sale, or has in his possession with intent to sell, any article, substance or compound made in imitation or semblance of butter or as a substitute for butter, and not made exclusively and wholly of milk or cream, or containing any fats, oils or grease not produced from milk or cream, shall have the words, — imitation butter, — or if such substitute is the compound known as, — oleomargarine, — then the word, — oleomargarine, — or if it is known as, — butterine, — then the word, — butterine, — stamped, labelled or marked in a straight line in printed letters of plain, uncondensed Gothic type, not less than one half-inch in length, so that said words cannot be easily defaced, upon the top, side and bottom of every tub, firkin, box or package containing any of said article, substance or compound. The said stamp, label or mark shall contain no other words. And whoever, by himself or his agents, exposes or offers for sale any of the said article, substance or compound not in the original package, shall attach to the said article, substance or compound, in a conspicuous place a label bearing the words, — imitation butter, — oleomargarine, — or, — butterine, — as the article may be, in printed letters of plain, uncondensed Gothic type, not less than one-half inch in length. And in cases of retail sales of any of said article, substance or compound not in the original packages, the seller shall, by himself or his agents, attach to each package so sold, and shall deliver therewith to the purchaser, a label or wrapper bearing in a conspicuous place upon the outside of the package the words, — imitation butter, — oleomargarine, — or, — butterine, — and no other words, in printed letters in a straight line of plain uncondensed Gothic type, not less than one-half inch in length."

Other provisions of the same Act, which need not be reproduced, recognize the sale of oleomargarine as lawful under prescribed conditions.

And on June 11, 1891, there was passed and approved another statute regulating the sale of oleomargarine, being chapter 112 of the Acts of 1891, of which the material parts are as follows: —

"AN ACT TO PROVIDE FOR THE PROTECTION OF DAIRY PRODUCTS AND TO ESTABLISH A STATE DAIRY BUREAU.

SECTION 1. Whoever sells or offers for sale, to any person who asks, sends or inquires for butter, any oleomargarine, butterine or any substance made in imitation of or semblance of pure butter, not made entirely from the milk of cows, with or without coloring matter, shall be declared guilty of fraud and punished by a fine of not less than one hundred dollars for each offence.

SECTION 2. Whoever exposes for sale oleomargarine, butterine or any substance made in imitation or semblance of pure butter, not marked and distinguished by all the marks, words and stamps required by existing laws, and not having in addition thereto upon every opened tub, package

or parcel thereof a placard with the word "oleomargarine" printed thereon in plain, uncondensed gothic letters, not less than one inch long, shall be fined not less than one hundred dollars for each offence.

SECTION 3. Whoever sells oleomargarine, butterine or any other substance made in imitation or semblance of pure butter, from any dwelling, store, office or public mart shall have conspicuously posted thereon the placard or sign, in letters not less than four inches in length, "oleomargarine sold here", or "butterine sold here." Said placard to be approved by the bureau hereinafter provided for by this act. Any person neglecting or failing to post the placard herein provided for shall be punished by a fine of not less than one hundred dollars for the first offence and one hundred dollars for each day's neglect thereafter.

SECTION 4. Whoever peddles, sells or delivers from any cart, wagon or other vehicle, upon the public streets or ways, oleomargarine, butterine or any substance made in imitation or semblance of pure butter, not having on both sides of said cart, wagon or other vehicle the placard in uncondensed gothic letters, not less than three inches in length, "licensed to sell oleomargarine", shall be punished by a fine of not less than one hundred dollars or imprisonment for not less than thirty days for each offence.

SECTION 5. Whoever furnishes, or causes to be furnished, in any hotel, restaurant or at any lunch counter, oleomargarine or butterine to any guest or patron of such hotel, restaurant or lunch counter, in the place or stead of butter shall notify said guest or patron that the substance so furnished is not butter, and any party so furnishing without such notice shall be punished by a fine of not less than ten nor more than fifty dollars for each offence."

* * * * * * * * * * * * *

"SECTION 10. The said bureau may work in unison with the state board of health, and with inspectors of milk, but they shall not restrict, limit or interfere with the duties of said officers. Nothing herein contained shall be held to circumscribe the rights of said bureau in the prosecution of offenders or the so-called dairy laws or all laws relating to milk, butter, cheese or any adulterations or imitations thereof wherever found within the Commonwealth."

* * * * * * * * * * * * *

"SECTION 13. This act shall take effect on the first day of September in the year eighteen hundred and ninety-one."

The court below was bound to take notice of these statutes, and to give them proper effect so far as material. The plaintiff in error brought the latter statute, chapter 112 of 1891, to the attention of the court, and contended that chapter 58 of 1891 was repealed by it. The court held the contrary. RECORD, p. 16.

This court will, if necessary, look at the whole legislation of

Massachusetts on the subject, to determine the meaning and effect of a particular statute.

Bowman *v.* Chicago, etc., Railway, 125 U. S. at p. 474.

It is clear on examination and comparison of these statutes that chapter 58 is not designed and has not the effect to prohibit the manufacture or all sales of oleomargarine in Massachusetts, but only, as the court below holds, to prohibit "oleomargarine which is deceptive," that is, in imitation of butter; leaving natural oleomargarine free to be sold under the conditions prescribed by this and the other statutes. RECORD, pp. 15, 16, 19, 20.

The theory of this statute is that oleomargarine in its natural uncolored state will disclose its own character sufficiently for the protection of the public; while, to the same end, artificial imitations of butter should be forbidden.

FIFTH ASSIGNMENT.

The fact set out in this assignment, if true, is immaterial, and the court was not called on to take judicial notice of it or give it any effect as against the Massachusetts statute. Whatever provisions against fraud may be made by the Act of Congress, the legislature of Massachusetts is not bound to regard them as sufficient, nor precluded by them from any farther enactments within its own power. And upon this question the judgment and action of the legislature are conclusive upon the courts.

Powell *v.* Pennsylvania, 127 U. S. 678, 684, 685.

In view of United States *v.* Dewitt, 9 Wall. 41, and similar cases, it is open to question whether these provisions of the Act of Congress are within its constitutional power, or of any legal operation or effect in the States. Congress has no direct power of police regulation in the States, and if these provisions against fraud are valid it must be only because they are properly incidental to the power of taxation.

SIXTH ASSIGNMENT.

This assignment is unfounded, as the statement is not correct. The petitioner offered to prove that the oleomargarine sold by him was a wholesome, palatable and nutritious article of food, in no way deleterious to the public health "or welfare," and it was agreed that he should have the benefit of the offer if material; and the court, evidently noticing and proceeding on this agreement, says in its opinion: "We are to assume that the oleomargarine sold by the petitioner was wholesome, palatable and nutritious." RECORD, pp. 4, 10, 16.

This gives the plaintiff in error substantially the full benefit of his offer of proof, and of his claim as set out in the assignment of error. The allegation as to the public *welfare* involves considerations of legal policy and is in the nature of a conclusion of law. And for the reasons above suggested under the second and third assignments, the court was not called upon to take notice of the fact claimed, except as it appeared in the case.

Further: the question here is a question of legislative power to prohibit a particular mischief; and the prohibition may extend so far as to exclude the good with the bad, if in the judgment of the legislature this is necessary to prevent the mischief aimed at. In this view, it is immaterial whether the article here sold was or was not wholesome.

Mugler *v.* Kansas, 123 U. S. 623, 662.
Powell *v.* Pennsylvania, 127 U. S. 678, 685.
Powell *v.* Commonwealth, 114 Pa. St. at pp. 295, 296.
Commonwealth *v.* Waite, 11 All. (Mass.) 264.
Commonwealth *v.* Savage, 155 Mass. 278.
State *v.* Addington, 77 Mo. 110.

The assumption upon which this assignment rests is contradicted upon the face of the Act of Congress of Aug. 2, 1886, upon which the plaintiff in error evidently puts so much dependence. The act specifies, in section 2, among the ingredients of oleomargarine, not only "all substances *heretofore known* as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine and neutral" (whatever they may be), and all mixtures and compounds thereof, but also "*all lard extracts and*

tallow extracts, intestinal fat and offal fat, made in imitation and semblance of butter or when so made, calculated or intended to be sold as butter." This is the Congressional oleomargarine, and it presents a marked contrast to the innocent and seductive compound exhibited to the court in the plaintiff's petition. The Massachusetts court will hardly be overruled for failing to take judicial notice that any imitation of butter made of the Congressional ingredients is necessarily "a valuable, wholesome, palatable and nutritious article of human food, and in no way deleterious to the public health or welfare." On the contrary, this court, Congress, and the State courts and legislatures, have uniformly dealt with oleomargarine as an article liable, if not likely, to contain noxious ingredients, detrimental to health.

SEVENTH ASSIGNMENT.

The court below must be deemed to have taken notice, so far as material, that in respect of the article sold the plaintiff in error "had complied with all the requirements of the Act of Congress," etc., as these facts were agreed. RECORD, pp. 13, 23. It is plain that the court regarded this as undisputed. But these facts were immaterial. The court had to deal with the other agreed fact, that the article sold by the plaintiff in error was not natural oleomargarine, but oleomargarine artificially colored to imitate butter, or made "in imitation of butter;" which brings it within the prohibition of the statute, unaffected by the Act of Congress. RECORD, pp. 10, 16.

As to the claim "that there was no fraud," the court below clearly did not assume any, or act upon this ground, except so far as fraud may be necessarily involved in the admitted violation of the statute. The plaintiff in error is not harmed, therefore, by the omission of the court to take notice of this fact, if there was such omission; and if so, it was justifiable and necessary.

All the facts set out in this assignment are immaterial, including the question of actual fraud, for reasons set forth below in discussing the Act of Congress; and the court was not called upon to take notice of them.

EIGHTH ASSIGNMENT.

The only construction of the Act of Congress of Aug. 2, 1886, called for below, or involved in the case, was (1) under the claim that the plaintiff in error was authorized by his license under this Act to make the sale for which he was prosecuted; (2) that the Act of Congress "does not give the State the right to prohibit the manufacture and sale of oleomargarine", and (3) that the Massachusetts statute "is in conflict with" the Act of Congress, "and with the exclusive right of Congress so to legislate."

The claim that the plaintiff in error is justified by his revenue license is clearly untenable. The contrary has long been settled.

Rev. Sts. U. S. sect. 3243.
24 St. L. 209, sect. 3.
License Tax Cases, 5 Wall. 462.
Pervear *v.* Commonwealth, 5 Wall. 475.
United States *v.* Dewitt, 9 Wall. 41.
Commonwealth *v.* Crane, 158 Mass. 218.
State *v.* Newton, 21 Vroom, 534.

The second and third points are disposed of by the reasons and authorities given below in discussing the Act of Congress, and by the fact that, so far from having an exclusive power, Congress has no power to regulate manufactures or trade within the States.

United States *v.* Dewitt, *supra*, and cases cited.
Patterson *v.* Kentucky, 97 U. S. 501.
Kidd *v.* Pearson, 128 U. S. 1, 20.

It is obvious that the first eight assignments of error are all directed toward the principal contention of the plaintiff in error, that oleomargarine is a subject of trade, recognized as such by Congress, naturally resembling light yellow butter, and that a State has no power to forbid the sale of it in the imported original package, whether artificially colored in imitation of butter or not, such artificial coloring not rendering it dele-

terious to health nor essentially changing its natural appearance or character; and therefore that the Massachusetts court should have assumed and held that the article in question is necessarily a proper subject of commerce, with the sale of which in the imported original package a State has no power to interfere, and should have set aside the statute, chapter 58, as in conflict with the commerce clause of the Constitution.

The Massachusetts court conceded so much of this claim as can be supported and as applies to the case in hand. It recognized that oleomargarine may be a subject of trade or commerce (as does the legislation of Massachusetts also, which permits its sale under certain restrictions), but declined to assume or hold that any standing which belongs to oleomargarine as a subject of commerce, under the Act of Congress or otherwise, necessarily deprives a State legislature of the power to forbid the manufacture or sale of a deceptive article, consisting of oleomargarine into which foreign ingredients have been introduced for the purpose of increasing its resemblance to natural dairy butter, or otherwise made in imitation of butter, with the effect, if not the actual intent, of making it an instrument of deceit; and this is supported both by principle and authority.

State *v.* Marshall, 64 N. H. 549.
State *v.* Addington, 77 Mo. 110.
Butler *v.* Chambers, 36 Minn. 69.
Weideman *v.* State (Minn.), 56 N. W. Rep. 688.
People *v.* Arensberg, 105 N. Y. 123.
McAllister *v.* Maryland, 72 Md. 390.
State *v.* Newton, *ubi supra*.
Commonwealth *v.* Shirley, 152 Pa. St. 170.
Powell *v.* Pennsylvania, *ubi supra*.

This claim of the plaintiff in error ignores the material distinction between "oleomargarine," generally, and "imitations of butter." The statute is against the latter, but not against the former as such. It is essential to the claim of the plaintiff in error that the statute be held prohibitive of all oleomargarine. But the Massachusetts court, as noted above, has held the contrary; and this construction is conclusive,

as this court would adopt it, and the plaintiff in error now submits to it.

The Federal Oleomargarine Law.

The plaintiff in error evidently puts much reliance upon the Act of Congress, 24 Stat. L. 209, and is really trying to obtain a declaration from this court that this Act is in effect a charter under which oleomargarine, as an established subject of commerce, may go into all the States, without let or hindrance. Unless this Act must be taken to have established all oleomargarine as so far a valid subject of interstate commerce as to be absolutely beyond reach of the police power of the States while in the original package, this contention fails. This makes it necessary to look more closely than would otherwise be necessary into the history, character and purpose of the Act of Congress.

That oleomargarine is an article of trade, and is capable of being a subject of interstate commerce, is conceded; but the Act of Congress adds nothing to such standing in trade or commerce as it had before.

The Act is not, and clearly is not designed to be, an act to regulate commerce among the States, or to have any direct effect on such commerce. It is in form and effect a revenue act. It was obviously intended to stand on this ground, and probably could not stand on any other. It will hardly be claimed that Congress has any direct power of legislation over manufactures or trade in the States.

> License Tax Cases, 5 Wall. 462, 470.
> Pervear *v.* The Commonwealth, 5 Wall. 475, 479.
> United States *v.* Dewitt, 9 Wall. 41.
> Kidd *v.* Pearson, 128 U. S. 1, 20.

The "importation and exportation" referred to in the title of the Act is exclusively *foreign*. See sections 10, 16, 18. There is not a word in the Act directly or necessarily referring to interstate commerce, or making or recognizing oleomargarine as a subject of such commerce. And section 3, by expressly adopting and incorporating into the Act sect. 3243, Rev. Sts. U. S., excludes any implication that the Act affords

any protection to the traffic in oleomargarine as against State legislation.

United States *v.* Dewitt, *ubi supra*
United States *v.* Whiskey, 108 U. S. 491.
State *v.* Newton, 21 Vroom, 534.
Commonwealth *v.* Crane, 158 Mass. 218.

The provision at the end of sect. 6, that all wholesale sales shall be "in original stamped packages" has no reference to interstate commerce in the article, but is intended solely to secure the proper marking of the packages for the information of the purchaser. This is evident from the other provisions of the same section.

A brief reference to the history of this Act will shed additional light upon it. It is supposed to be common knowledge that the Act was passed at the desire and demand of the farmers and dairymen of the country, in the interest of the production and sale of genuine dairy butter: and this is reasonably apparent from the Act itself. From careful examination of its various provisions, the inference is strong that Congress, while willing to put restrictive legislation upon oleomargarine in the interest of the producers of genuine butter, assumed that this could properly be done only by the exercise of the power of taxation, with its incidents of inspection and supervision: and as the purpose of the Act was not to promote oleomargarine but to restrain it, Congress designedly refrained from putting into the Act anything of which the effect would be to establish the article in the commerce of the States, or force it upon States which are unwilling to have it: but imposed taxes upon its manufacture and sale wheresoever it might lawfully be manufactured or sold, with stringent provisions for inspection and supervision (Sections 3, 5, 10, 13, 14, 15), at the same time regulating the *foreign* importation or exportation of it, and that alone. It is clear that the statute affords no ground to claim that Congress has undertaken to legitimate oleomargarine, or to establish it as a subject of commerce among the States, or to express any view or policy whatever upon the subject of commerce in it among the States. It leaves oleomargarine, as a subject of interstate commerce, exactly where it found it.

If anything more is necessary to make it certain that the character and purpose of the Act are as here described, it is abundantly furnished by the proceedings of Congress upon it.

While this court will not ordinarily construe an act of Congress by the debates, the proceedings of Congress may be consulted upon certain questions.

> Blake *v.* National Banks, 23 Wall. 307, 317.
> District of Columbia *v.* Wash. Market Co. 108 U. S. 243, 254.

And the general history of legislation and the circumstances accompanying it may be regarded, at least so far as they can be considered matters of common knowledge.

> Siemens *v.* Sellers, 123 U. S. at p. 285.
> Holy Trinity Church *v.* U. S. 143 U. S. at p. 463.
> Smith *v.* Townsend, 148 U. S. at pp. 494, 495.

It would seem that the origin and history of this statute were and are so public and familiar that they may be properly referred to, and therefore it appears permissible to insert here such references as may be sufficient to aid the general knowledge of the Court.

The action of Congress was based upon a multitude of petitions from farmers, dairymen and butter-makers in all parts of the country, all of substantially the same character and upon substantially the same grounds, of which the following (Congressional Record, Vol. 17, part 5, p. 4611) will serve as a specimen: —

"The undersigned, dairymen and butter-makers, respectfully petition your honorable body for the adoption of the bill of the American Agricultural and Dairy Association, introduced by Hon. Warner Miller of New York, in the Senate, and Hon. William L. Scott of Pennsylvania, in the House of Representatives, placing the manufacture and sale of all imitation butter under the control of the Commissioner of Internal Revenue and taxing it ten cents per pound. And your petitioners represent that the prompt adoption of such an effective measure is absolutely necessary to save the dairy industry of

the United States from ruin, and to protect the consumers of butter from fraud and imposition of the most extreme character."

The petitions went in both branches to the committee on Agriculture. The bill was reported by that committee to the House of Representatives, and was referred to the Committee on Agriculture of the Senate when received there from the House.

Congressional Record, Vol. 17, part 4, p. 3931.
Ibid, part 5, pp. 4612, 5344.

It was universally treated as a measure to restrict oleomargarine, under an exercise of the taxing power for the purpose of raising revenue. It was challenged and defended in both branches on this ground.

Congressional Record (House), Vol. 17, part. 5, pp. 4865–4867.

Ibid (Senate), pp. 4611, 4612.
Ibid, Vol. 17, part 7, pp. 7139, 7140.

It was principally advocated on three grounds: (1) The protection of the dairy and butter-producing interests; (2) the protection of the public against fraud; and (3) the protection of the public health. As to the latter ground especially: —

Cong. Rec. (House), Vol. 17, part 5, pp. 4868–69.
" " " " " " " " 5055.
" " " " " " " " 5129.
" " " " " " " " 5203.
Cong. Rec. (Senate), Vol. 17, part 7, pp. 7073, 7075–78.
" " " " " " " " 7086–87.

To the same effect: —

Cong. Rec. Vol. 17, part 5, pp. 4611, 4612, 4865–4872, 5004–5011, 5052–5056, 5123–5130, 5201–5212, 5340, 5341–5344.

Ibid, part 7, pp. 7069–7088, 7128–7152, 7185–7199, 7200–7202, 7396–7402.

From the history of the Act, in its origin and passage through Congress, these things are certain: —

1. Its actual purposes were the protection of the producers of genuine butter, the protection of the public against fraud, and the protection of the public health, in view of the noxious character of the ingredients of oleomargarine.

2. It was passed in the exercise of the power of taxation, as a revenue bill, and was never put upon any other ground.

3. It was uniformly opposed by the friends of oleomargarine as a measure to *prevent* the manufacture or sale of that article under color of a revenue act.

4. There is not a word in the proceedings of Congress to indicate the understanding of that body, or of any member of either branch, that the act was an exercise of any power of Congress over interstate commerce, or that the commercial power of Congress was in any way involved in the matter; nor to indicate any purpose of Congress to give oleomargarine any added character or standing, in commerce or elsewhere. The attitude of Congress is exactly the contrary. So far as the actual intent and purpose of Congress are to be considered, the Act is unquestionably for the prevention, and not for the promotion, of oleomargarine.

It was enacted several years before the decision of Leisy *v.* Hardin, and while the License Cases (especially Peirce *v.* New Hampshire) were understood to state the law as to the relations between the police powers of the States and the powers of Congress under the commerce clause. It must be assumed that Congress acted in contemplation of this state of the law; and this strengthens the inference that Congress did not intend or believe the act to have any effect to force oleomargarine upon the States against their own regulations.

There is no implication or inference from the fact that Congress has exercised the power to tax oleomargarine, especially in view of the history of the Act, that it has made or intended to make or declare it a subject of interstate commerce. No such inference can be properly drawn in any such case.

Patterson *v.* Kentucky, 97 U. S. 501, 505; "It is not to be supposed that Congress intended [by the patent laws] to authorize or regulate the sale within a State of tangible personal property which that State declares to be unfit and unsafe for use, and by statute has prohibited from being sold or offered for sale within her limits."

There is nothing in United States *v.* Eaton, 144 U. S. 677, the only case in this court arising out of the Oleomargarine Act, that recognizes or intimates that it gives oleomargarine any additional standing in trade, or any standing as a subject of interstate commerce, or even affirms the validity of the Act for any purpose. The only point decided was that a rule of the Treasury made under it was invalid. The general validity, meaning or effect of the Act itself did not come into question.

NINTH ASSIGNMENT — THE INTERSTATE COMMERCE QUESTION.

That the Massachusetts statute is in conflict with the commerce clause of the Constitution.

LEISY *v.* HARDIN DISTINGUISHED.

The question presented here is different and distinguishable from that involved in Leisy *v.* Hardin, 135 U. S. 100, and no such question has ever been decided by this court under the commerce clause of the Constitution. It has never yet been held that an *imitation* of a common and necessary article of food, a "bogus" article, calculated if not designed to deceive, and of at least doubtful character in its effect upon the public health, must be so far recognized as a proper subject of interstate commerce as to be in every case beyond the police powers of the States.

It is obvious that the doctrine of Leisy *v.* Hardin is not necessarily decisive of the present case unless it is to be taken as establishing the extreme rule that the police powers of the States are absolutely ineffectual under any circumstances to reach any sort of article, however objectionable, imported from another State, while in the original package in the hands of the importer.

That case decides only that a State cannot prohibit the sale by the importer in the original package, of intoxicating liquors brought from another State. An important and necessary factor in the argument is that intoxicating liquors are of such established commercial character that it is beyond the power of a State to exclude them from protection of the constitutional provision as a subject of commerce. It is not to be assumed

that if the question had been of prohibiting the sale of an imitation of liquor, or adulterated liquor, the decision would have been the same. The Massachusetts statute with which we are dealing is primarily for protection against fraud and deceit, and incidentally for protection of the public health; being designed and directed to forbid the manufacture or sale of deceptive artificial imitations of butter, liable to contain noxious ingredients. It therefore presents a question quite different from that of Leisy *v.* Hardin.

Whatever point may be reached by science or commerce in the future, it cannot be said to-day that an imitation of butter, made of animal fats and other like substances is, as matter of law, so far a necessary subject of legal protection as commerce that it is beyond the power of a State legislature to assume, in the exercise of its police powers for the protection of the public against fraud or disease, that it is or may be an objectionable article in every aspect. The question whether an artificial imitation of an article of food, designed and calculated to deceive purchasers, and liable if not likely to impair the public health, is as matter of law entitled to all the consideration of any legitimate subject of traffic, under the commerce clause of the Constitution, has never before been presented to this court.

The question here is essentially the same as would have been presented in Leisy *v.* Hardin if the article there in question had been an adulteration or counterfeit imitation of genuine intoxicating liquor. That case does not establish that such an article is necessarily so far a legitimate subject of commerce that it must be taken to be absolutely beyond the reach of State police legislation if imported from another State; and there is no previous decision of this court which involves, or necessarily or by fair construction leads to, such a conclusion. And this court, obviously feeling the necessity for caution in traversing this unstable ground, has said in one of the latest cases, much relied on in Leisy *v.* Hardin, that the question of interference with the Federal power by the States must be determined in each case upon its own facts as they arise.

Bowman *v.* Chicago, etc., Railway, 125 U. S. 482, 483.

The contention of the plaintiff in error here does not follow from Leisy *v.* Hardin or any other decided case. Because the

court has held genuine spirituous or malt liquors, as an established subject of commerce, to be beyond the police powers of the States while in the hands of the importer, must it be also held that the same immunity belongs to every vile concoction put upon the market as liquor? Because flour, beef and mutton are protected as subjects of commerce (138 U. S. 78; 141 U. S. 62) must the same protection be extended to beans or chicory offered and sold as coffee, glucose as sugar or syrup, sulphate of lime as cream of tartar, cotton oil as lard, or cabbage-leaves as tobacco? A recent work on the adulteration of food enumerates more than a hundred articles of common use which are constantly put upon the market with adulterations, some noxious and some merely worthless, varying in amount from one to eighty-five per cent. Has a State no power to protect its citizens against such "subjects of commerce" if they happen to come from over the line? The plaintiff in error says no; and the court must say no, in order to support his claim. These illustrations are exactly within the interpretation here claimed for Leisy *v.* Hardin, which will protect all these if it protects "imitation butter," whether called oleomargarine or by whatsoever name.

It is not necessary to go so far as to contend that the article here in question comes within the doctrine of the quarantine and other similar cases, as so inherently vicious or mischievous as to be incapable of being under any circumstances a subject of commerce. This court has often declared that articles which are capable of being lawful and proper subjects of traffic may be of such a character as to be within reach of the police power of the States, notwithstanding the commerce clause.

Mayor of New York *v.* Miln, 11 Pet. 102, 139.
License Cases, 5 How. 504, 600, 631, 632.
Slaughter House Cases, 16 Wall. 36, 87.
Beer Company *v.* Massachusetts, 97 U. S. 25, 33.
Guy *v.* Baltimore, 100 U. S. 434, 443.
Mugler *v.* Kansas, 123 U. S. 623, 658, 659.
Kidd *v.* Pearson, 128 U. S. 1, 26.
Leisy *v.* Hardin, 125 U. S. at pp. 154, 158.
Crowley *v.* Christensen, 137 U. S. 86, 89.
Crutcher *v.* Kentucky, 141 U. S. 47, 60.

"Imitation butter" belongs in this class. It is a deceptive imitation of an article of food of universal and practically of necessary use, and is designedly made deceptive by the introduction of the artificial coloring matter which is necessary to enable it to pass for butter. It is common knowledge, and indeed is alleged in the plaintiff's petition (RECORD, p. 4), that oleomargarine is "designed to take the place of butter." It is adapted to be made an instrument of deceit, whether so used in every case or not. This is universally recognized by the courts and legislatures, State and national, in dealing with it. If it once finds its way into the market it is reasonably certain from common experience that it will be so used, and that people will be induced to buy and to eat it under the supposition that they are buying and eating genuine butter. It is an injury to the citizen in his property to deceive him into the purchase or use of an inferior and imitation instead of the genuine and superior article. It is an infringement of the public welfare, and contrary to public policy, to permit such deception. It is a reasonable exercise of the police power of a State to forbid it; and a statute for this purpose is within the doctrine of this court that the police power of the States may extend to articles which, though capable of being subjects of commerce, are liable to injuriously affect the public safety or the public welfare.

The doctrine, that if the prohibited article "belongs to commerce," or is capable of being a subject of commerce, it is *ipso facto* beyond reach of the police power of the States, which seems to have arisen out of some remarks of Mr. Justice Catron in the License Cases, 5 How. at p. 600, has never yet been established as a rule of law, and such a rule would be unnecessary in law and unwise in policy. A rule much easier of application and enforcement, which gives full and proper effect to the commerce clause, is that, if the prohibited article is of a character generally recognized as a proper subject of the exercise of the police power, and if the prohibition is in fact an exercise of that power, in good faith and without discrimination (which it is always for this court to finally determine), the prohibition is not a regulation of commerce nor otherwise an invasion of the power of Congress, but a proper exercise of a power admitted to belong to the States and to them alone.

The cases since Leisy *v* Hardin, (Minnesota *v.* Barber, 136 U. S. 313, Brimmer *v.* Rebman, 138 U. S. 78, and Voight *v.* Wright, 141 U. S. 62) which are alike in principle, are different and distinguishable from that case and from this. Minnesota *v.* Barber goes upon the ground that the necessary effect of the statute there in question was to practically forbid the importation into Minnesota from other States of a variety of wholesome articles of food, and so that the statute was a direct interference with and an attempt to regulate insterstate commerce (in connection with which it is to be borne in mind that neither the statute here in question nor any other Massachusetts statute excludes or prohibits oleomargarine, but that on the contrary they expressly permit it); and the further ground, which was the ground of decision in the two later cases, that the statute necessarily and in terms discriminated against the products of other States and in favor of the products of the legislating State.

There was no question in either of these cases of the prohibition of a deceptive or fraudulent article, — an imitation of a common article of food. Each stands on the ground of discrimination. It is clear that neither of these decisions determines or necessarily affects the present question.

THE MASSACHUSETTS STATUTE A VALID POLICE REGULATION.

If the case at bar is not controlled by Leisy *v.* Hardin, the court may confidently be asked to hold that the Massachusetts statute is a proper exercise of the police power of the State, and is not in conflict with the commerce clause or other provision of the Constitution. That precisely similar legislation against imitations of butter is a proper exercise of the police power has been decided in this court, and often elsewhere, by a current of authority thus far unbroken.

Powell *v.* Pennsylvania, *ubi supra*.
Powell *v.* Commonwealth, 114 Pa. St. 265.
Commonwealth *v.* Shirley, 152 Pa. St. 170.
State *v.* Marshall, 64 N. H. 549.
State *v.* Addington, 77 Mo. 110.
Butler *v.* Chambers, 36 Minn. 69.
Weideman *v.* State (Minn.), 56 N. W. Rep. 688.

People *v.* Arensberg, 105 N. Y. 123.
State *v.* Newton, 21 Vroom, 534.
McAllister *v.* Maryland, 72 Md. 390.

People *v.* Marx, 99 N. Y. 377, which is believed to be the only decision of the highest court of any State against any form of restrictive oleomargarine legislation, is in conflict with Powell *v.* Pennsylvania. It seems to have been cited to this court in that case, but is not noticed in the opinion of the court, though quoted and approved by the dissenting justice. It went on the ground that the statute there in question was an absolute prohibition of "any article *designed to take the place* of butter or cheese," of whatsoever character. The court carefully distinguished this from the statutes against *imitations* of butter, like the one here in question, which were afterward sustained by the same court in People *v.* Arensburg, *supra*.

The broad question of legislative power to absolutely prohibit any wholesome article of food does not arise under the Massachusetts statute, as noted in several of the cases cited. The elements of imitation and deception exclude this question.

In addition to the reasons already suggested which support the Massachusetts statute as a proper exercise of the police power for the prevention of fraud, and not a regulation of commerce, it must, if necessary, be regarded as resting also upon another ground, invariably recognized as among the highest grounds of the exercise of the police power, — the protection of the public health. It must be assumed, if necessary or material, that in the enactment of this statute the legislature of Massachusetts had this object in view, no less than the public welfare in other respects. It is common knowledge that it is often charged and widely believed that ingredients deleterious to health are more or less used in the manufacture of oleomargarine. Congress knew this and acted upon it, as already noted, in sections 2 and 14 of the Oleomargarine Act, as a thing to be assumed. State legislatures and courts have proceeded upon it; and this court has sustained the legislation of Pennsylvania against oleomargarine on this ground, with others, in Powell *v.* Pennsylvania, *supra*. If this belief is cor-

rect, or if it may be reasonably so assumed, it is enough to support a general prohibition of the article, in the exercise of the police powers of a State for the protection of the public health. It is immaterial whether the article in question in this case is or is not wholesome, or that a general prohibition of oleomargarine may prevent the sale and use of that which is wholesome as well as that which is not. The legislature may reasonably consider that the sale and use of the noxious article can only be effectually prevented by a general prohibition of the whole; and they have a right to go as far as, in their judgment, the prevention of the mischief requires. This is a familiar rule of police legislation.

Mugler *v.* Kansas, 123 U. S. 623, 662.
Powell *v.* Pennsylvania, 127 U. S. at p. 685.
Powell *v.* Commonwealth, 114 Pa. St. at pp. 295, 296.
Train *v.* Boston Disinfecting Co. 144 Mass. 523.
Commonwealth *v.* Waite, 11 All. (Mass.) 264.
Commonwealth *v.* Savage, 155 Mass. 278.
State *v.* Addington, 77 Mo. 110.

It may reasonably be inferred from the allusion in the opinion of the court below (RECORD, p. 17) to the protection of the public health as a common ground of such legislation, that they would have sustained this statute on this ground if it had been found necessary.

See also Commonwealth *v.* Evans, 132 Mass. 11.

It is immaterial that the statute does not expressly except oleomargarine or imitations of butter imported from foreign countries. Probably no foreign oleomargarine is imported into this country; and the legislature may have deemed the exception unnecessary for this reason. The statute can be construed as not applying to a foreign importation, and should be, in favor of constitutionality. That the Supreme Court of Massachusetts would construe it as not applying to a foreign product, see

Commonwealth *v.* Gagne, 153 Mass. 205, 209.

Apart from the commerce question, it is clear that the Massachusetts statute will stand unless Powell *v.* Pennsylvania is to be overruled. The Pennsylvania statute sustained in that case was in every material particular the same as the Massachusetts statute, except that the title declared it to be "for the protection of the public health," as well as for the prevention of adulteration and fraud, and that it went farther, in wholly prohibiting any article "designed to take the place of butter or cheese," as well as imitations or adulterations, and therefore to this extent was more open to objection. There was in that case also the same proof or offer of proof that oleomargarine is wholesome and nutritious. The statute was challenged here as a mere cover for the protection of dairy products, as not a lawful exercise of the police power, and as depriving of property without due process of law and denying the equal protection of the laws, under the Fourteenth Amendment. But the court overruled these and all other objections, and the decision is conclusive of every question arising here except the commerce question.

The Statute not a Regulation of Commerce.

The statute obviously is not designed or intended as a regulation of interstate commerce. It does not touch importation or transportation. As this court has said of similar legislation, it has "no relation to the movement of goods from one State to another." The prohibition is general and without discrimination, applying alike to all inhabitants of Massachusetts and all others. It does not forbid the carriage or storage of the forbidden article, or its importation for the consumption of the importer, or for any other use to which it can be put, except for sale in Massachusetts. And it leaves natural uncolored oleomargarine as free to be imported into and sold in Massachusetts as any other article of trade.

With the sole exception of Leisy *v.* Hardin, in all the decisions of this court on the conflict of State legislation with the commerce clause, the leading test has been the question of discrimination. See Machine Co. *v.* Gage, 100 U. S. 676, and cases cited. This was recognized and affirmed by the court as lately as Walling *v.* Michigan, 116 U. S. at p. 460.

It is said in the plaintiff's petition (RECORD, p. 5) that no oleomargarine is made in Massachusetts, and that most of that which is sold there comes from Illinois and Indiana. This is not a fact in the case (See Agreed Facts, RECORD, p. 13), but if it is true, one reason for it is before the court, in the statute which prohibits the manufacture of imitations of butter in Massachusetts; and it affords no ground of argument that the statute is discriminative. That question is determined upon the face of the statute. Oleomargarine was formerly made in Massachusetts and it is well understood that one reason why it is not made there still is because it cannot be successfully made or sold without artificial coloring, to enable it to pass for butter. Another and probably the principal reason is that it can be most cheaply manufactured in the western cities which are the centres of the pork and beef trade. And the fact that it cannot be successfully or profitably manufactured under this law (that is, without artificial coloring) affords a clear inference how far oleomargarine in its natural unadorned state "always resembled yellow butter" or "cannot be manufactured without resembling light yellow butter," as claimed by the plaintiff in error.

The statute is exactly within the terms and reasons of a doctrine which has been repeatedly affirmed by this court.

Sherlock *v.* Alling, 93 U. S. 99, 103: "In conferring upon Congress the regulation of commerce it was never intended to cut the States off from legislation on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution."

Patterson *v.* Kentucky, 97 U. S. 501, 505: "It is not to be supposed that Congress intended [by the patent laws] to authorize or regulate the sale within a State of tangible personal property which the State declares to be unfit and unsafe for use, and by statute has prohibited from being sold or offered for sale within her limits."

Guy *v.* Baltimore, 100 U. S. at p. 443: "In the exercise of

its police powers a State may exclude from its territory or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the health or which would endanger the lives or property of its people. But if the State, under guise of its police powers, should make such exclusion or prohibition applicable solely to articles of that kind that may be produced or manufactured in other States,' it would come within the Constitutional provision.

Walling *v.* Michigan, 116 U. S. at p. 459: "It is suggested . . . . that the tax is an exercise by the legislature of Michigan of the police power of the State for the discouragement of the use of intoxicating liquors and the preservation of the health and morals of the people. *This would be a perfect justification of the Act if it did not discriminate against the citizens and products of other States in a matter of commerce between the States.*"

Kidd *v.* Pearson, 128 U. S. at p. 26: "The police power of a State is as broad and plenary as its taxing power, and property within the State is subject to the operation of the former so long as it is within the regulating restrictions of the latter;" in connection with which it is to be remembered that the court has held, in cases cited below (p. 27) that imported goods from other States are subject to State taxation, even in the hands of the importer, if there is no discrimination against them in favor of domestic goods.

It was suggested below, and may be here, that the statute is not in reality an exercise of the police power for the prevention of fraud or protection of health, but is an act for the protection of butter and the producers of butter. This cannot be assumed. The court cannot say that it "has no real or substantial relation to the objects" with which it purports to deal, and this is the test. Powell *v.* Pennsylvania, *supra*. The intention to violate the Constitution is not to be imputed to a State. *In re* Rahrer, 140 U. S. at p. 564.

The question of the prohibition of artificial imitations of butter, even for the purpose of promoting the use of the genuine article, is a question of legislative policy. It is wholly for the legislature of Massachusetts to determine it for the people of that State, and no court can inquire whether, as a question

of policy, it is rightly determined. If the legislature has the power to pass the statute, the court will assume that it was passed in the exercise of the power, and for a proper purpose. It does not affect the question of legislative power, or even of good faith, that the legislature knew or supposed that a result of the statute would be to affect or even to prevent interstate commerce in oleomargarine. The statute plainly is not designed as a regulation of commerce; and the fact that an incidental or necessary result of its operation may be to protect butter, or to affect the traffic in oleomargarine, affords no argument against it, if it can be taken as an exercise of the police power. The court will look for grounds on which to support it; not to overturn it.

It is decided that goods imported from another State for use or sale may be taxed, in common with domestic products, and that for this purpose they become "part of the general mass of property in the State" when they "come to their place of rest, for final disposal or sale."

> Brown *v.* Houston, 114 U. S. 622, 632, 633, 634, cited with approval in
> Robbins *v.* Shelby Taxing District, 120 U. S. 489, 497.

And that "the police power of the State is as broad and plenary as its taxing power; and property within the state is subject to the operation of the former so long as it is within the regulating restrictions of the latter."

> Kidd *v.* Pearson, 128 U. S. at p. 26.

It follows, with at least equal reason, that the police regulations of the States may be applied to an article of interstate commerce when it has arrived and is deposited at the place of its destination for use or sale, and that so applied they are not regulations of commerce.

The principle of Cooley *v.* Port Wardens, 12 How, 299, may properly be applied to cases like the present. Traffic within a State in articles which are or may be proper subjects of the exercise of the police power, and which the welfare of one State may require it to permit and that of another to forbid, is a proper subject of local regulation, at least until

Congress acts as to the particular article; according to the rule laid down in Brown *v.* Houston, *supra*, at p. 634.

Leisy *v.* Hardin reconsidered.

If it should still be considered that the case is within the doctrine of Leisy *v.* Hardin, and if that case is held to extend so far as absolutely to exclude the application of any police regulations of the States to any article of commerce, of whatever character, while in the unbroken package in the hands of the importer, the court is respectfully requested to reconsider that decision.

As the rule of Leisy *v.* Hardin did not necessarily follow from any previously established doctrine, the reconsideration of it does not involve the reversal of previous cases. The way is the more open to reconsider it by reason of the fact that Congress promptly took occasion to avoid it, as to the only subject to which it directly applied, by the Wilson Act, so called, of Aug. 8, 1890; since which time it has not been operative as part of the law on that subject.

It is unnecessary to restate the reasons against that decision which are assigned in the dissenting opinion, nor to re-examine the authorities there cited and considered; nor can it be expected that much will be added to what is there said. It is respectfully submitted that the decision is a departure from the true meaning of the commerce clause of the Constitution, and from the intent of the framers of that instrument; and that it is unnecessary, unsatisfactory and impolitic. It was received with surprise, and it is hardly too much to say with regret; it has not yet taken root in law, legislation or commerce; and there has been a general feeling that if it means all that has been claimed for it, it is a proper subject of farther examination.

When the court came to the consideration of Leisy *v.* Hardin, it had been the settled and accepted law for nearly half a century, as held in the License Cases (Peirce *v.* New Hampshire), that the police regulations of a State may be applied to an original package of intoxicating liquors in the hands of the importer from another State. In that case four

justices held that such regulations, so applied, are not regulations of commerce at all; and the other justices held that they were valid because Congress had not acted upon the subject.

In the interval, the doctrine had been established that interstate commerce is a subject admitting, if not requiring, one system of regulation, and that the silence of Congress is conclusive of its will that it shall be free.

But no rule had been formulated for determining what is, or what is not, a regulation of commerce; nor at precisely what point of time or stage of its transit a subject of interstate commerce ceases to be such and comes within the regulating power of the State of its destination (see Welton *v.* Missouri, 91 U. S. at p. 282); nor had it ever been established by direct decision that the right of importation necessarily carries the right to sell the imported article, nor, therefore, that an imported package necessarily remains within the protection of the commerce clause and beyond the reach of State police regulations until broken up or sold.

In this state of the law, it was open to the court in Leisy *v.* Hardin to follow Peirce *v.* New Hampshire, and to hold that the right of importation does not necessarily carry the right of sale (which was affirmed by several of the justices in that case) and that an article which has reached its final destination for use or for sale thereupon ceases to be a subject of commerce within the exclusive control of Congress, and comes within the regulating power of the State (as held in Brown *v.* Houston 114 U. S. 622); and that reasonable police regulations of the States, applied to such an article in this situation, are not regulations of commerce.

But the court determined the questions which still remained open and were essential to the decision, adversely to the powers of the States. This was not necessary by reason of any previous decision, and upon these points Leisy *v.* Hardin was new, and was and is the sole direct authority.

It was said by the court in Leisy *v.* Hardin, in substance, that although the precise question before the court was an open one, its decision there seemed to follow from Gibbons *v.* Ogden and Brown *v.* Maryland, and that this is demonstrated in Bowman *v.* Chicago & Northwestern Railway. With the utmost

deference, it is difficult to perceive that it followed, necessarily or at all, from either of these cases. The points upon which Leisy *v.* Hardin turned, which distinguished it from all previous cases, and which made it necessary to overrule Peirce *v.* New Hampshire, namely, that the right of importation necessarily carries the right of sale, and that the silence of Congress as to intoxicating liquors as a subject of commerce is under any and all circumstances conclusive against any application of the police powers of the States to an imported package until broken up or sold, were not determined in either of the earlier cases; and in Bowman's case the first question did not arise, and the other was carefully and expressly reserved. (125 U. S. 482, 483.)

In Bowman's case, the court seems to have been influenced by some things which cannot fairly be assumed. At page 494 it is said that the State "may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures or arts of any description, and prevent the introduction and sale within its limits of any and all articles that it may select as coming into competition with those which it seeks to protect. The police power of the State would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace and morals of the people."

With great respect, it must be said that this is not sound reasoning. It is universally conceded that the commerce clause prevents discrimination by a State against other States in articles of commerce which it permits to its own citizens. It is a question for this court in every case whether the legislation is a reasonable exercise of the police power, without discrimination, and without the purpose to regulate commerce. And to determine this the court need only apply its own rule, as stated by Mr. Justice Miller in Morgan *v.* Louisiana, 118 U. S. at page 462: "In all cases of this kind it has been repeatedly held that, when the question is raised whether a State statute is a just exercise of said power or is intended by roundabout means to invade the domain of Federal authority, this court will look into the operation and effect of the statute to discern its purpose." See also Mugler *v.* Kansas, 123 U. S. 661. If the

legislation is a reasonable exercise of the police power, for the protection of the people in their property, health or general welfare, and is free from the element of discrimination against foreign products, it is not a regulation of commerce and does not conflict with the commerce clause of the Constitution.

And in Bowman's case, at p. 482, the court recognized and affirmed that the necessity for inferring the complete freedom of commerce in the absence of congressional regulation "perhaps does not exist equally in reference to commerce among the States," and that "the same inference is not always to be drawn from the absence of congressional legislation as might be in the case of commerce with foreign nations. The question therefore may still be considered in each case as it arises, whether the fact that Congress has failed in the particular instance to provide by law a regulation of commerce among the States is conclusive of its intention that the subject shall be free from all positive regulation or that, until it positively interferes, such commerce may be left to be freely and fully dealt with by the respective States."

This declaration of the court recognizes that there is not sufficient reason for carrying the doctrine of the "silence of Congress" so far as to hold that Congress is to be taken in every case as intending by mere inaction to nullify the police powers of the States, or to force upon any State any article prohibited by it to all persons, without discrimination, in the exercise of the police power. The inaction of Congress for more than forty years, from the License Cases in 1846 to Leisy *v.* Hardin in 1889, as observed by the dissenting justices in the latter case, and its reversal of the latter decision as to the only subject to which it directly applied, by the Act of Aug. 8, 1890 (Supp. Rev. Sts. U. S., I, p. 779) indicates its understanding that the law was, and its intent that it should remain, as declared in Peirce *v.* New Hampshire.

Congress has manifested its policy to exclude spurious, adulterated and unwholesome foods and drinks from the United States. 26 St. L. 414; Supp. Rev. Sts. U. S., I, p. 794. Can it be said that while Congress is actively exerting its powers for the exclusion of all such articles from introduction into any part of our territory through foreign commerce, it is to be taken as designedly promoting their introduction into every State from any or every other State?

The interpretation claimed for Leisy *v.* Hardin results in this: that the citizens of every other State in the Union may carry on without let or hindrance in Iowa or Massachusetts a traffic which these States, in the exercise of their undoubted powers and on the highest grounds of the public welfare, absolutely prohibit to their own citizens; and conversely, the citizens of Iowa or Massachusetts may do the same thing in every other State; and thus, so far from the equality of rights and privileges which the Constitution was intended to secure, we have in each State the extraordinary spectacle of non-residents defying with impunity the laws which its own people have made for their own protection and are bound to obey, and the Constitution of the United States is made to confer in each State upon the citizens of every other State greater rights, privileges and immunities than are possessed by its own citizens.

It cannot be a true construction of the Constitution which leads to such a result. It is the precise thing of which Chief Justice Waite, dissenting with Justices Field and Gray in Robbins *v.* Shelby Taxing Dist. 120 U. S. at p. 501 said: "I cannot believe the Constitution of the United States makes such a thing necessary."

It has been said that the contrary rule would lead to "commercial anarchy." This is a formidable term. But proper and equitable police regulations of the States have been applied to subjects of interstate commerce, almost without question, for a hundred years, and it is not generally understood that commercial anarchy has followed. It is not going far to say that the people of the United States will readily take the chances of any disaster to commerce from the proper exercise of the police power, rather than submit to the general application of a rule which reverses the policy and breaks down the legislation of States at the will of any non-resident trader.

Original Meaning and Purpose of the Commerce Clause.

It is now familiar that we have departed from the original construction of the Constitution upon various important questions, under the pressure of war or of great social or

political changes. But this does not require any departure from it which is unnecessary and impolitic. And it is beyond question that the decision in Leisy *v.* Hardin goes beyond the original intent of the Constitution. It may be confidently asserted that there is not a word in the debates on the Constitution, or in the Federalist, which supports such an extreme doctrine. Nothing can be clearer from the history of the commerce clause than that the thing in view was to prevent discrimination by one State against others. It was not thought of, that the effect of this clause would be to force upon the people of a State a foreign product which it forbade to its own citizens.

Federalist, VII., XI., XVII., XXII., XXXIII., XLII.
Madison Papers (Debates), Vol. 5, 432–434, 454, 547, 548.

In the Federalist, XLII., Mr. Madison urges the interstate commerce clause principally as essential to the completeness of the power to regulate *foreign* commerce, in order to prevent States through which foreign imports and exports have to pass from laying burdens upon them. In Federalist, XVII., Mr. Hamilton argues the improbability that the Federal government would ever attempt to interfere with the police power or other like powers of the States. It was only by such assurances as these that the Constitution was carried at all.

If the question had been put to the constitutional convention whether the Federal government should be empowered to prevent or materially interfere with the domestic regulation of the liquor traffic, or with the exercise of any similar police powers of the States, there can be little doubt that the answer would have been a unanimous negative. If it had been there understood that this provision was likely ever to be carried to the length of Leisy *v.* Hardin, there would hardly have been an interstate commerce clause in the Constitution. If this had been understood among the people, it is not unlikely, in view of the state of the public mind at that time, that a Constitution containing such a provision would have been rejected.

It is reasonably evident also that the framers of the Constitution did not understand that they were giving Congress an exclusive power over this subject, with the effect to deprive the States of all power to make any laws affecting commerce, but only a power of control if Congress should see fit to exercise it. Madison Papers, Vol. 5, 539, 540, 547, 548.

It is unnecessary to go so far as in Leisy *v.* Hardin to give full and proper effect to the commerce clause, and at the same time leave the States in the exercise of the police powers which the Constitution intended to leave to them, which it was universally understood that they possessed, and which they have constantly exercised, at least down to that decision in 1889. Police legislation, which in the judgment of the legislature is reasonably necessary to the protection of the life, health, property or welfare of the citizen, which is not designed to regulate commerce, which is applied to all alike without discrimination, and which is of a character recognized by the courts as a proper exercise of the power, is valid, and does not conflict with the commerce clause of the Constitution rightly construed. Such legislation is not, in any proper sense, a regulation of interstate commerce. It is the regulation of the domestic affairs of the State. It is easier to draw this line than the line between what is necessarily and what may not necessarily be a subject of interstate commerce, as to which this court has often confessed its own sense of difficulty. This construction leaves the States in the exercise of powers which ought always to be exercised with special regard to the needs and desires of the particular community to which they are applied, which is a subject of local knowledge, with which Congress cannot successfully deal; and it leaves Congress in the exercise of all the general powers for the regulation of interstate commerce which the framers of the Constitution intended to confer upon it, and which are necessary for the prevention of the mischief against which the commerce clause was designed to guard.

In view of the original meaning and intent of the Constitution, of the practical construction of the commerce clause from the earliest times, of the construction put upon it by this court

in Peirce *v.* New Hampshire, which conformed to the practical construction and settled the law with the universal assent of the governments and people of the States and the Union for nearly half a century, and in view of the fact that Leisy *v.* Hardin has been reversed by Congress and that its doctrine has not become fully established either in the law or the commerce of the country, it is yet open to the court to hold that reasonable police regulations of the States, made in good faith and without discrimination, may be applied to subjects of interstate traffic, of a character recognized in law as proper subjects of such regulation, when they have come to their destination and are there deposited, and that such regulations so applied are not regulations of commerce and are valid.

TENTH ASSIGNMENT — THE FOURTEENTH AMENDMENT.

That the statute is in conflict with the Fourteenth Amendment of the Constitution of the United States.

The statute is not in conflict with this amendment. It is settled that the rights claimed by the plaintiff in error are not among the "privileges or immunities" thereby guaranteed.

Slaughter House Cases, 16 Wall. 36, 74–80.
Bartemeyer *v.* Iowa, 18 Wall. 129, 133.
Mugler *v.* Kansas, 123 U. S. 623, 657.
Kidd *v.* Pearson, 128 U. S. 1, 16.
In re Rahrer, 140 U. S. 545, 554.
McPherson *v.* Blacker, 146 U. S. 1, 38.

That this amendment does not operate to restrain the proper exercise of the police powers of the States.

Barbier *v.* Connolly, 113 U. S. 27, 31.
Mugler *v.* Kansas, *supra*, at p. 663.
Powell *v.* Pennsylvania, 127 U. S. 678, 687, 689, and cases cited.
Kidd *v.* Pearson, *ubi supra*.
In re Rahrer, *ubi supra*.
Giozza *v.* Tiernan, 148 U. S. 657, 661.

That such legislation as the present is a proper exercise of the police power, notwithstanding the amendment.

Cases last cited.

And that such legislation does not operate to deprive any person of liberty or property without due process of law, nor to deny to any person the equal protection of the laws, in the sense of the amendment.

Slaughter House Cases, *supra*, at p. 80.
Munn *v.* Illinois, 94 U. S. 113, 123–125.
Railroad Co. *v.* Richmond, 96 U. S. 521, 529.
Hagar *v.* Reclamation Dist., 111 U. S. 701, 707.
Barbier *v.* Connolly, *supra*, at p. 31.
Mugler *v.* Kansas, *ubi supra*.
Powell *v.* Pennsylvania, *ubi supra*.
Kidd *v.* Pearson, *ubi supra*.
Dent *v.* West Virginia, 129 U. S. 114.
In re Rahrer, *ubi supra*.
Giozza *v.* Tiernan, *ubi supra*.

Powell *v.* Pennsylvania, *supra*, is directly in point and is conclusive upon every question which can be raised in the present case under the Fourteenth Amendment. It is noted above that the Pennsylvania statute sustained in that case was the same as that now in question, except in its title and that it went farther, in prohibiting "any article designed to take the place of butter or cheese," and that it was attacked as not an exercise of the police power but for the protection of butter and cheese, and that there was also the offer to prove the wholesomeness of oleomargarine. The decision meets every point presented here, the court saying, *inter alia*, the following:

"The court . . . . cannot adjudge that the defendant's rights of liberty and property have been infringed by the statute of Pennsylvania without holding that although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public health, and to prevent the adulteration of dairy products and fraud in the sale thereof, it has in fact no real or substantial relation to this subject. The

court is unable to affirm that this legislation has no real or substantial relation to such objects."

As to the offer of proof that the article in question was wholesome and nutritious: "It is entirely consistent with that offer that many, indeed, that most, kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court cannot say from anything of which it may take judicial cognizance that such is not the fact. Under the circumstances disclosed in the record, and in obedience to other rules of constitutional construction it must be assumed that such is the fact."

And upon the argument that the statute could not operate to forbid the manufacture or sale of a wholesome article: "Whether the manufacture of oleomargarine or imitation butter of the kind described in the statute is or may be conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection; or whether it involves such danger to the public health as to require for the protection of the people the entire suppression of the business rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy, which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes the rights secured by the fundamental law, the legislative determination of this question is conclusive upon the courts."

Powell *v.* Pennsylvania, 127 U. S. at pp. 684, 685.

ELEVENTH ASSIGNMENT.

It is agreed that this assignment will not be insisted on.

TWELFTH ASSIGNMENT.

The only question of the construction of chapter 58 or chapter 412 of the Acts of 1891 which was raised below, except those already considered under the fourth, eighth and ninth assignments, was whether chapter 58 was repealed by implication by chapter 412. The court held that it was not. RECORD, pp. 15, 16. It is agreed that this will not be further contested.

THIRTEENTH ASSIGNMENT.

No question is believed to arise under this assignment beyond those already considered.

ALBERT E. PILLSBURY,

For the Commonwealth of Massachusetts,
Defendant in Error.